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Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits

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This Article addresses the timely and controversial topic of constitutional limits on punitive damages and brings a criminal punishment theory perspective to the analysis of this issue. The question of how to determine when punishment is unconstitutionally excessive has been and continues to be a subject of intense debate in the courts and scholarly circles. The United States Supreme Court has subjected criminal sanctions, criminal forfeitures, and punitive damages to a proportionality requirement, but the Court uses different approaches to the proportionality analysis depending on the type of punishment. In the criminal context, the Court has retreated in large part from proportionality review, deferring to legislative maxima for criminal sentences. By contrast, where there is no legislative cap on the punitive damages a jury can award, the Court has undertaken a more active role in determining the proportionality of punitive damages. Similarly, where there is no legislative limit to the amount of property that can be forfeited, the Court has engaged in a more active proportionality review. An analysis of the Supreme Court's different proportionality reviews demonstrates that the different approaches are explained by the presence or absence of legislative limits on punishment.

This Article examines the nature of punishment and the requirements for just punishment—notice, proportionality, and limits—and applies these principles to punitive damages. It concludes that a system that imposes no limits on the amount of punitive damages awards contravenes the principle of notice and leaves courts with little guidance in assessing the excessiveness of particular awards. To bring punitive damages into conformity with the principles of just punishment and to provide courts with a benchmark for evaluating the proportionality of punitive damages awards, the Article concludes with proposals for legislative limits on such awards. Because of the importance of limits on punishment, including punitive damages, this Article suggests how states can impose caps on punitive damages awards that serve the policy interests of punishing and deterring wrongful and harmful conduct, and how states can use caps to justify large awards in appropriate cases that will survive excessiveness challenges.

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Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits

LEO M. ROMERO*

I. INTRODUCTION

The question of whether punitive damages awards are constitutionally excessive remains a controversial topic. The United States Supreme Court continues to review punitive damages awards to determine whether they comport with due process, vacating in 2007 a punitive damages award of $79.5 million against a tobacco company, Philip Morris USA,[1] and in the 2008 Term reducing to $507 million a $2.5 billion award against Exxon Shipping Co. for an oil spill by the tanker, Exxon Valdez.[2] Despite the efforts of the Supreme Court to formulate adequate criteria for determining when punitive damages awards are disproportional to the punishable conduct and therefore excessive,[3] the issue of limits on punitive damages, whether constitutional or as a matter of common law excessiveness,[4] continues to be a subject of intense debate in the courts and scholarly circles.

The United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell,* finding a punitive damages award excessive under the Due Process Clause, spawned considerable scholarly comment on punitive damages. The articles cover a range of topics that examine punitive damages from a variety of perspectives, including

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[1] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007). The Court did not decide whether the award was excessive but decided only that the Due Process Clause prohibits a punitive damages award from "punish[ing] a defendant for injury that it inflicts upon nonparties." *Id.* at 1063. The Court then vacated the award on grounds that the jury instruction did not protect the defendant from the possibility of being punished for injuries to nonparties. *Id.* at 1064–65.

[2] Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 42 (U.S. June 25, 2008). The jury awarded $5 billion against Exxon, and the Court of Appeals for the Ninth Circuit reduced it to $2.5 billion. *In re* Exxon Valdez, 490 F.3d 1066, 1068 (2007).

[3] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418–28 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–86 (1996). See *infra* Section IV for a discussion of the Supreme Court's efforts to develop guideposts for assessing the constitutionality of punitive damages awards.

[4] *See, e.g.*, Exxon Shipping Co., No. 07-219, slip. op. at 28.

empirical,[5] policy,[6] historical,[7] and constitutional.[8] Only a handful, however, have looked at punitive damages from the perspective of criminal theory—comparing punitive damages to other forms of punishment.[9] Most

[5] For empirical perspectives of punitive damages, see, for example, Denise E. Antolini, *Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001*, 20 J.L. & POL. 143 (2004); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004); W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405 (2004). For other empirical studies published before the decision in the *State Farm* case, see generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study,* 87 CORNELL L. REV. 743 (2002); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); Neil Vidmar & Mary R. Rose*, Punitive Damages by Juries in Florida in Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487 (2001). For book reviews of Sunstein, see Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239 (2003); Catherine M. Sharkey, *Punitive Damages: Should Juries Decide*, 82 TEX. L. REV. 381 (2003).

[6] For articles criticizing punitive damages, see, for example, Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429 (2004); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003). For articles supporting punitive damages, see, for example, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993); David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781 (1996); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461 (2005); Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297 (2005) [hereinafter Rustad, *Iron Cage*]; Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003); Paul J. Zwier, *The Utility of a Nonconsequentialist Rationale for Civil-Jury-Awarded Punitive Damages*, 54 U. KAN. L. REV. 403 (2006).

[7] *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1146–52 (2006) (chronicling the punitive damages cases decided by the Rehnquist Court to reflect the Court's hostility toward litigation and distrust of the ability of litigation to ensure corporate compliance with legal and ethical requirements).

[8] For a constitutional analysis of punitive damages, see, for example, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1 (2004).

[9] For comparative studies of punitive damages, see, for example, Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461 (2000); Pamela S. Karlan*, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004); Rachel A. Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217 (2003); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000). One article proposes using guidelines similar to the federal sentencing guidelines for determining the dollar amount of punitive damages. Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 813–21 (2006). See Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005), for an interesting attempt to divide punitive damages into civil and criminal aspects based on whether punitive damages reflect a plaintiff's right to be punitive (civil) or reflect society's need to punish (criminal). The distinction would determine whether constitutional protections, including scrutiny for excessiveness, would apply. According to Professor Zipursky, punitive damage awards regarded as reflecting the plaintiff's right to be punitive would not be subject to excessiveness review. *Id.* at 167–68.

of these articles lament the fact that the Supreme Court appears to apply a more stringent review of punitive damages awards for excessiveness than it does of criminal sentences.[10] Others attempt to explain the proportionality jurisprudence of the Court in addressing punitive damages, criminal sanctions, and forfeitures.[11] Some articles avoid the proportionality issue by attempting to describe punitive damages as a type of compensation for losses not covered by compensatory damages.

This Article views punitive damages as pure punishment and not compensatory.[12] It therefore builds on proportionality studies involving different types of punishment and analyzes punitive damages through the prism of criminal punishment theory.[13] It examines the nature of punishment and the requirements for just punishment—notice, proportionality, and limits—and applies these principles to punitive damages. It concludes that a system that imposes no limits on the amount of punitive damages awards contravenes the principle of notice and leaves courts with little guidance in assessing the excessiveness of particular awards. To bring punitive damages into conformity with the principles of just punishment and to provide courts with a benchmark for evaluating the proportionality of punitive damages awards, this Article proposes legislative limits on such awards.

According to the United States Supreme Court, the Constitution requires that punishment in its various forms—imprisonment, fines, forfeiture, and punitive damages—be proportional to the wrongful conduct that justifies punishment. The Court finds the constitutional sources of the proportionality requirement in the Excessive Fines Clause[14] (fines and

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[10] *See* James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247 (2004); Gershowitz, *supra* note 9, at 1276. See also Van Cleave, *supra* note 9, at 222, for commentary chiding the Supreme Court's handling of punitive damages differently than criminal sentences.

[11] For further commentary of the Court's punitive damage proportional analysis, see, for example, Gershowitz, *supra* note 9; Karlan, *supra* note 9.

[12] The United States Supreme Court, likewise, views punitive damages as separate from compensatory damages and aimed solely at punishing the defendant. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 18–19 (U.S. June 25, 2008).

[13] An evaluation of the Court's procedural requirements for awarding punitive damages is beyond the scope of this Article. *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007) (concerning a harm-to-others instruction that failed to protect a defendant's due process rights); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) (requiring jury instruction prohibiting the use of defendant's out-of-state conduct to punish the defendant); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (concerning proper standard of review on appeal); Honda Motor Co. v. Oberg, 512 U.S. 415, 419 (1994) (addressing post-verdict review); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19–20 (1991) (concerning jury instructions). For due process analysis of punitive damages, see generally Anthony J. Fanze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm*,* 6 U. PA. J. CONST. L. 423, 425, 427–30 (2004); Anthony J. Fanze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. L. 423 (forthcoming 2008).

[14] U.S. Const. amend. VIII; United States v. Bajakajian, 524 U.S. 321, 334 (1998).

forfeitures), the Cruel and Unusual Punishment Clause[15] (imprisonment terms and the death penalty), and the Due Process Clause[16] (punitive damages).

In addition to constitutional limits, the Court has imposed an excessiveness limitation on punitive damages in federal maritime cases. Exercising its common law authority to regulate federal damages in the absence of a statute, the Court in *Exxon Shipping Co. v. Baker* adopted a limit on punitive damages equal to the amount of compensatory damages—a 1:1 ratio cap.[17] The Court arrived at this limit by looking at ways in which states regulate punitive damages awards for excessiveness and settled on a ratio between compensatory and punitived damages as the most promising basis for setting a cap on punitive damages.[18] After reviewing different ratio caps adopted by states[19] and empirical studies showing the median ratio of punitive to compensatory damages to be about 0.65:1, the Court adopted a ratio cap of 1:1 as the limit on punitive damages in federal maritime cases.[20]

In its review of the proportionality of punishment, the United States Supreme Court treats legislatively limited punishment differently than ad hoc punishment.[21] In the area of criminal prison sentences, the Court for the most part defers to the legislative determinations regarding the proper amount of punishment and finds a sentence within the legislative maximum excessive in only the rarest of cases. In the area of punitive damages, where there is no legislative limit on the size of awards, the Court has shown little deference to the jury's determination and instead has engaged in a search for guideposts to assess the proportionality of the

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[15] U.S. Const. amend. VIII. *See, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion) (utilizing the modified proportionality test adopted in *Harmelin* by Justice Kennedy); Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring) (recognizing that the proportionality principle of the Cruel and Unusual Punishment clause is narrow); Solem v. Helm, 463 U.S. 277, 284 (1983) (noting that the Cruel and Unusual Punishment clause prohibits "sentences that are disproportionate to the crime committed."); Rummel v. Estelle, 445 U.S. 263, 271 (1980) (plurality opinion) ("This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.").

[16] U.S. Const. amend. XIV, §1. *See, e.g.*, *State Farm*, 538 U.S. at 416 ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.") (citations omitted); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

[17] Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 40 (U.S. June 25, 2008).

[18] *Id*. at 33.

[19] *Id*. at 37.

[20] *Id.* at 40.

[21] *Compare, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 998–1000 (1991) (Kennedy, J., concurring) (relying on principles that substantially defer to the legislative determination of proportional punishment), *with* State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (engaging in a strict review of punitive damages, applying guideposts to determine whether the punitive damages award was excessive).

award.[22] Similarly, in evaluating forfeitures for excessiveness, the Court, in the absence of legislative limits, has looked to other referents to determine whether the value of property forfeited is proportional to the misconduct.[23]

Courts, however, have difficulty formulating adequate criteria to judge the proportionality of punitive damages awards. Courts lack the institutional competence to make what in essence amounts to policy decisions.[24] Legislatures, on the other hand, do make policy. They make judgments that reflect the understanding of the community. In addition, legislative judgments on the permissible amount of punitive damages provide fair notice to potential wrongdoers and prevent gross disparities in awards.

From moral, rule of law, and constitutional perspectives, punishment requires an upper limit, preferably established by a legislative body. Legal punishment is the prerogative of the state, and punishment, to be legitimate in a democratic society, must be authorized and limited by the state in the form of legislative enactment. The legislature, representing society's judgments, must both define the conduct that deserves punishment and determine the limits of that punishment.[25] The requirement of limits on punishment applies to all types of punishment, including punitive damages.[26] Criminal sanctions, as set forth in criminal codes, reflect society's judgment as to the proportionality of punishment to wrongful conduct.[27]

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[22] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996) (adopting the following guideposts: degree of reprehensibility, ratio of punitive damages to compensatory damages, and sanctions for comparable conduct); *see also infra* notes 103–08 and accompanying text.

[23] *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 338–39 (1998) (determining whether the forfeiture amount was excessive by looking at the degree of gravity of the conduct and the authorized imprisonment and fine sanctions for comparable conduct); *see also infra* notes 274–82 and accompanying text.

[24] Justice Stevens and Justice Ginsburg believe that Congress, rather than the Court, should make the policy judgments regarding limits on punitive damages. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 4 (Stevens, J., dissenting); *id.* at 1 (Ginsburg, J., dissenting).

[25] *See, e.g.*, *BMW*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

[26] In addition, punishment in any form requires the extra procedural protections provided by the Constitution. *See, e.g.*, Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effects Theory*, 2006 U. ILL. L. REV. 691, 693 (2006) ("[W]here the state authorizes or enforces sanctions having either a systematically deterrent or systematically retributive social effect, the potential threat posed to civil rights always justifies affording [enhanced procedural protections] to suspects or defendants."). Professor Fellmeth's requirement of enhanced procedural protections should include notice of the limits on punishment.

[27] In the area of criminal sanctions, including both imprisonment and fines, states and the federal government have criminal codes that define criminal conduct and establish the authorized punishment for violations. For examples of statutes defining criminal offenses, see 18 U.S.C. §§ 1-2725 (2008), Cal. Penal Code §§ 1-15003 (West 2008), N.Y. Penal Law §§ 1.00–500.10 (McKinney 2008), and 18 Pa. Cons. Stat. Ann. §§ 101-9352 (West 2008). These codes give notice as to the prohibited conduct and set forth the maximum punishment for different crimes based on the relative wrongfulness of the

Punitive damages, however, punish without a societal judgment about proportionality in the many states that have no legislatively imposed limits.[28] Nineteen states have enacted caps of different forms,[29] including statutes that cap punitive damages as a fixed dollar amount,[30] as a fixed ratio to the amount of compensatory damages,[31] as a fixed ratio subject to a dollar limit,[32] and as a dollar limit based on the income, profit from misconduct, or net worth of the defendant.[33] Apart from the states that have imposed legislative caps and the six states that do not recognize punitive damages, there is no legislative judgment as to proportionality of punishment to wrongful conduct. Juries have virtually unlimited discretion to determine the amount of money the defendant deserves to pay for the wrongful conduct.[34]

Jury determinations of the amount of punitive damages in a particular case differ significantly from legislative limits. Jury determinations are ad hoc based on the particulars of specific cases, which include facts about the plaintiff and the injuries suffered, the defendant, and the conduct involved.

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crimes. Not everyone agrees that criminal codes reflect proportional punishment. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 882 (2005) (blaming courts' willingness to interpret federal statutes broadly on forcing "federal criminal law . . . out of kilter with any sense of moral proportion" and causing "all crimes, both serious and trivial, [to be] punished with remarkable severity"). Modern criminal codes grade the seriousness of criminal offenses and authorize different punishments depending on the seriousness of the offenses. The adoption of sentencing guidelines in some jurisdictions reflects an effort to measure more precisely the amount of punishment based on the seriousness of the crime and to insure consistency and uniformity in punishment. *See, e.g.,* U.S. SENTENCING GUIDELINES MANUAL (2006) 1 (detailing the function of the sentencing guidelines); MINN. SENTENCING GUIDELINES 1 (2005) ("The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history.").

[28] Similarly, forfeitures have no legislative limits. In the case of forfeiture of property used in a crime, there is no legislative limit on the value of the property subject to forfeiture or any legislative determination that measures the value of the property forfeited to the seriousness of the crime committed. *See, e.g.*, 18 U.S.C. § 982(a)(1) (2008) (mandating forfeiture of the property used in the offense with no dollar limit). As a result, the value of the property forfeited may exceed any fine authorized for commission of the crime. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 339 n.14 (1998) (valuing the property subject to forfeiture at $354,144, whereas the maximum fine was $250,000).

[29] *See* Rustad, *Iron Cage*, *supra* note 6, at 1339–46 (illustrating a useful chart listing the states with caps on punitive damages).

[30] *Id.* at 1346; *see, e.g.*, Va. Code Ann. § 8.01-38.1 (West 2008) (capping punitive damage awards at $350,000 with no exceptions).

[31] Rustad, *Iron Cage*, *supra* note 6, at 1347; *see, e.g.*, Colo. Rev. Stat. Ann § 13-21-102(1)(a) (West 2008) (limiting punitive damage awards to a one-to-one ratio with actual damages awarded).

[32] Rustad, *Iron Cage*, *supra* note 6, at 1347; *see, e.g.*, Fla. Stat. Ann. § 768.73(1)(a)(1-2) (West 2008) (limiting punitive damages to three times the amount of compensatory damages, but not exceeding $500,000).

[33] Rustad, *Iron Cage*, *supra* note 6, at 1348; *see, e.g.*, Kan. Civ. Proc. Code Ann. § 60-3701(e)–(f) (West 2008) (limiting punitive damages to the lesser of the annual gross income earned by the defendant or $5,000,000).

[34] *See, e.g.,* Karlan, *supra* note 9, at 883 (contrasting the statutory boundaries imposed on juries in criminal cases to authorized particular punishments; jury "determination[s] of punitive damages amounts is so much less constrained").

In addition, juries in punitive damage cases do not consider, like a legislative body, the range of wrongful conduct that deserves punishment or the measure of punishment that ought to apply to different degrees of wrongfulness. As a result, a jury can make an ad hoc punitive award that can differ substantially from another jury's award for similar misconduct. Such ad hoc and different determinations of punitive damages by juries do not, therefore, represent broad societal judgments about the right proportion of punishment to bad behavior.

A system permitting punitive damages awards to be set in any amount without limit violates two principles of legality. First, defendants do not have sufficient notice of the consequences for their conduct. They do not know how much punishment a particular jury will impose.[35] Knowing that there is no limit to the dollar amount a jury may award hardly satisfies notice sufficient to satisfy due process concerns.[36] Second, the absence of limits on punitive damages allows for wide disparity in awards for defendants by different juries. In fact, the same misconduct has produced very different punitive damages awards in two cases against a tobacco manufacturer, Philip Morris Inc., involving essentially identical claims and evidence. In the California case, the jury awarded the plaintiff $50 million in punitive damages,[37] whereas in the Oregon case, a different jury returned a verdict of $79.5 million.[38] Although a limit on punitive damages awards would not eliminate disparity in awards, a limit would reduce disparity to the extent that no awards could exceed the limit.

To produce more uniform punitive damages awards, and to make awards for similar misconduct more equal, misconduct justifying punitive damages should be graded like crimes and assigned different dollar limits.[39] Limits on punitive damages—whether a single cap, multiple limits based on categories of misconduct, or narrowly defined limits based on guidelines—would provide notice of allowable punishment and produce more uniformity than an open-ended system of punitive damages. In addition, limits based on categories or guidelines would bring punishment

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[35] *See, e.g.*, Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 29 (U.S. June 25, 2008).

[36] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."); *id.* at 587 (Breyer, J., concurring) (agreeing with the majority that basic notions of fairness require notice of the severity of a penalty and assurance of uniform general punishment for those similarly situated).

[37] Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42, 86 (Cal. Ct. App. 2003).

[38] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1061, 1063 (2007) (opting not to decide whether the award was "grossly excessive," but deciding only that the Due Process Clause prohibits a punitive damages award from "punish[ing] a defendant for injury that it inflicts upon nonparties").

[39] It has been suggested that even more uniformity could be achieved by adopting punitive damages guidelines similar to the federal sentencing guidelines used to determine the appropriate prison sentence for criminal violations. *See* Jiang, *supra* note 9, at 813–17 (proposing punitive damages guidelines modeled on the grid system in the Federal Sentencing Guidelines).

more in line with the nature of the misconduct.

Legislative limits on punitive damages will also assist courts in assessing an award for excessiveness. Proportionality of punishment to an offense involves two judgments—how serious is the offense and how much punishment does it deserve. In the case of criminal punishment, legislatures make these judgments. In the context of punitive damages, however, juries make them. The challenge of a proportionality review is the difficulty of knowing when a legislatively authorized sentence or a jury award is excessive.[40] An excessiveness evaluation necessarily involves a matter of degree regarding the gravity of the conduct and the measure of punishment,[41] and the evaluation has no clear litmus test that separates excessive punishment from proper punishment.[42]

What factors can reviewing courts use to assist in the proportionality determination, especially if reviewing courts wish to avoid deciding the issue on the subjective views of the judges as to the proper proportion of punishment to offense? The one factor that seems to have the most influence is the legislative judgment about the proper proportion of punishment to misconduct.[43] Substantial deference by courts to legislative judgments about the maximum penalties in the criminal context reflects the importance of this factor.[44] Although deference will not insulate a legislatively authorized punishment from a proportionality review, legislative judgments about the gravity of an offense and the proper punishment it deserves will withstand most proportionality challenges.[45]

In the absence of legislative determinations regarding the proportionality of punitive damages, the United States Supreme Court has been forced to make its own judgments about the proportionality of

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[40] *See, e.g.,* Karlan, *supra* note 9, at 882–83 (commenting that proportionality is "an inevitably unsatisfactory measure of constitutionality" because of the difficulty "in translating the [proportionality] principle into a standard for judicial oversight").

[41] *Id.* at 898 ("Ultimately, proportionality review demands a judgment about the seriousness of a defendant's crime.").

[42] *Id.* at 883 ("For all the Court's invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective.").

[43] *Id.* at 898 ("Either the Supreme Court can look outward—to the 'work product of legislatures and sentencing jury determinations' . . . or it can look inward—to the Justices' own understandings about the gravity of particular conduct.").

[44] *See, e.g.*, Ewing v. California, 538 U.S. 11, 24–25 (2003) (plurality opinion) (noting a "traditional deference to legislative policy choices" in sentencing); Harmelin v. Michigan, 501 U.S. 957, 998–99 (1991) (plurality opinion) ("[R]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.") (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)).

[45] It is beyond the scope of this Article to address the question of when courts should not defer to a legislative judgment and how courts should determine that a legislatively authorized punitive damages award or criminal sentence is excessive. For a thoughtful discussion of these questions, see Karlan, *supra* note 9, at 889–93 (suggesting three circumstances under which a court might reject the legislative judgment regarding the proportionality of punishment). This Article does not concede that the Supreme Court's proportionality jurisprudence in the criminal context is entirely justified and does not propose complete deference to legislative caps in the punitive damages context.

punitive damages awards in the context of constitutional review of state awards[46] as well as in the exercise of common law review of federal awards.[47] With no guidance from a legislative determination, the Court has engaged in a stricter scrutiny of punitive damages awards, adopting other reference points or guideposts for reviewing punitive damages awards for excessiveness. These guideposts include an assessment of the gravity of the wrongful conduct based on the harm caused and the culpability of the offender,[48] a comparison of the punishment with the harm caused,[49] comparisons with punishment for the same conduct in other jurisdictions, and comparisons with other punishments authorized for the different offenses in the same jurisdiction.[50]

Punitive damages, to be morally justified and to conform to due process, must be limited and proportional to the wrong being punished. The determination of proportionality is a particularly legislative function entitled to judicial deference. In the absence of legislative limits on punitive damages, judicial review of proportionality requires other reference points and invites an active judicial role.[51] The recent United States Supreme Court cases addressing the proportionality of punishment in the context of prison terms, punitive damages, and forfeitures show that the presence or absence of legislative limits on punishment explains the different approaches used by the Court to decide whether a particular type of punishment is excessive. Legislatures should set limits on punitive damages, as they do for criminal violations, that reflect societal judgments regarding the gravity of the wrongdoing and the amount of punishment deserved. Caps for particular misconduct may be set low or quite high depending on the legislature's judgment about the reprehensibility of the wrong. Limits on punitive damages awards will provide notice of the maximum consequences for wrongful conduct, minimize wide disparities in the amount of punitive damages awards, and assist courts in the

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[46] *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425–26 (2003) (explaining there were no legislative caps on the damages the jury could award in either state, Alabama or Utah, and the Court determined that the award of punitive damages in each case was excessive in view of the defendant's conduct); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86, 595 (1996) (overturning the judgment of the Alabama Supreme Court).

[47] *See, e.g*., Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 33–40 (U.S. June 25, 2008) (adopting a ratio cap on punitive damages in federal admiralty cases).

[48] See *State Farm*, 538 U.S. at 419 (discussing the reprehensibility guidepost); *BMW*, 517 U.S. at 575–76 (same).

[49] *See State Farm,* 538 U.S. at 424–26 (discussing the ratio guidepost); *BMW*, 517 U.S. at 580–82 (same).

[50] *See State Farm*, 538 U.S. at 428 (discussing sanctions for comparable conduct guidepost); *BMW*, 517 U.S. at 583–84 (same).

[51] *See, e.g.*, *Exxon Shipping Co.*, No. 07-219, slip. op. at 29 (responsibility for regulating punitive damages in federal maritime cases lies with the Court in the absence of statute). See also, Justice Stevens' critique of the majority's adoption of a ratio cap of 1:1 in the Exxon case. *Id.* at 4 (Stevens, J. dissenting) ("The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments.").

proportionality analysis. Moreover, the imposition of limits on punitive damages will bring this type of punishment into line with the principle of just punishment and the rule of law principle prohibiting arbitrary decisions with no constraints.

II. RETRIBUTION BASIS FOR PROPORTIONALITY

Of the major theories of punishment, retribution provides the most principled basis for determining whether punitive damages are excessive or proportional.[52] Retribution justifies punishment because it is deserved due to wrongful conduct.[53] Basic to the retribution theory is the notion of just deserts—persons should receive the punishment they deserve, no more and no less.[54] What is deserved punishment depends on the wrongfulness of the conduct. The more serious the crime, the harsher the punishment should be, and the severity of the punishment should reflect society's "level of condemnation or disapproval" of the conduct.[55] There is a degree of shared agreement about the relative wrongfulness of unlawful acts and about the relationship between the punishment scale and the wrongfulness scale. For example, most criminal codes share the view that a deliberate killing is worse than a provoked intentional killing, which is worse than an unintentional reckless killing, which is worse than a negligent killing.[56] In accordance with this hierarchy of homicides, criminal codes authorize different punishments for the different killings reflecting their relative seriousness.

Retribution theory offers a formula for measuring the wrongfulness of

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[52] *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683–84 (2005) (explaining that prohibition on excessive punishment should be understood as a "side constraint" that embodies retributivism); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 59–61 (2000) (arguing that only the retribution theory of punishment can adequately support proportionality principle).

[53] Parr, *supra* note 52, at 61.

[54] Lee, *supra* note 52, at 699–700.

[55] *See* Joel Feinberg, *The Expressive Function of Punishment*, in A READER ON PUNISHMENT 71, 89 (R.A. Duff & David Garland eds., 1994) ("[T]he degree of disapproval expressed by the punishment should 'fit' the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval."); Lee, *supra* note 52, at 710 ("The harshness of the punishment should reflect our level of condemnation or disapproval of the criminal act.").

[56] *See, e.g.,* 18 U.S.C. §§ 1111–12 (2000) (classifying a deliberate killing as murder in the first degree and punishable by death or life imprisonment, a provoked killing as voluntary manslaughter punishable by not more than ten years, and an unintentional killing not amounting to second degree murder as involuntary manslaughter punishable by no more than six years); N.Y. Penal Law §§ 70.00, 125.10–.11, 125.15, 125.20–.22, 125.25, 125.27 (2008) (classifying an intentional killing as murder punishable by a term of fifteen years to life, a provoked killing as manslaughter in the first degree punishable up to twenty-five years, and an unintentional killing classified as either manslaughter in the second degree or criminally negligent homicide punishable up to fifteen years for manslaughter in the second degree or four years for criminally negligent homicide).

conduct, and therefore, the deserved punishment.[57] The proper proportion, or just deserts, of punishment to crime depends on two factors—the harm caused or threatened and the culpability of the offender in committing the offense.[58] This retributive notion—that punishment is deserved and that the severity of the punishment should be measured by how much punishment is deserved—embodies the concept of proportionality.[59]

The notion of just deserts also reflects notions of fairness—fairness to the victim, to the law-abiding, and to the defendant.[60] A penalty that is viewed as too lenient will be seen as unfair to victims, the law-abiding and other defendants who were punished more severely. Likewise, a punishment that is viewed as too harsh in the sense that it is more severe than deserved will be seen as unfair to the defendant and an abuse of governmental power.

The proportionality principle in retribution theory also reflects another aspect of fairness—uniformity and equal treatment.[61] Offenders of similar culpability who commit the same crime should receive similar punishments, and offenders differing in culpability should receive different penalties based on just deserts, in proportion to their blameworthiness.[62] Concepts of fairness support both uniform, or at least similar, punishment for similarly situated defendants (fairness to the defendant and other defendants) and differential punishment for dissimilar offenders (fairness to be treated differently from other defendants whose conduct and culpability are markedly different).[63]

Although the United States Supreme Court has recognized that one of the purposes of punitive damages is deterrence, deterrence alone cannot justify punishment. This utilitarian theory, which aims to prevent unlawful and harmful conduct in the future by using punishment as a painful lesson to the wrongdoer and others, has a moral foundation only if based on the wrongdoing of the defendant. As a result, most criminal law theorists and moral philosophers view deterrence as a valid theory of punishment, but

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[57] *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363 (1981) (equating the punishment deserved to *r x H*, where *r* represents the degree of responsibility and *H* represents the magnitude of the harm).

[58] Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005) [hereinafter Frase, *Punishment Purposes*]; Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L.F. 259, 282 (1990); *see* Lee, *supra* note 52, at 703 (discussing Robert Nozick's "contemporary restatement of retributivism"); *see also* Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 602 (1978) (discussing the renewal of the theory of retribution).

[59] *See* von Hirsch, *supra* note 58, at 282.

[60] Frase, *Punishment Purposes*, *supra* note 58, at 73.

[61] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 24–25 (1968) (arguing that like cases should be treated alike is a principle of justice that bears on the amount of punishment); Frase, *Punishment Purposes*, *supra* note 58, at 73–74.

[62] Frase, *Punishment Purposes*, *supra* note 58, at 74.

[63] *Id.*

one that can come into play only when it is proper to punish.[64] And it is only proper to punish for retribution for having committed an unlawful act in the past.[65]

Deterrence and other utilitarian theories, unlike retribution, do not help much in determining whether punishment is excessive.[66] Utilitarian theories do not limit the amount of punishment based on the nature of the crime, and the punishment can be severe or lenient based on goals that have no relationship to the gravity of the wrong.[67] Punishment based on deterrence need not be anchored to the seriousness of the wrong.[68] For example, if illegal parking is a major problem in a community, and there is a perceived need to deter illegal parking by imposing harsh sentences, a sentence of life imprisonment might well reduce such conduct. In this extreme example, life imprisonment for parking violations, an example of excessive punishment offered by the Supreme Court,[69] could be justified under a deterrence theory.[70] Certainly, nothing in the deterrence theory would prohibit a life sentence for illegal parking if the cost-benefit calculation supported a life sentence.

Likewise, the incapacitation theory of punishment, based on the need to prevent criminals from committing more crimes, may conflict with retribution principles.[71] To use the same example above, if a person has

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[64] *See, e.g.*, HART, *supra* note 61, at 1–12 (showing the importance of retribution in restricting punishment to offenders, no matter that punishment may have a deterrent effect); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 16 (1968) (stating that prevention of crime, including deterrence of future crime, is the primary purpose of the criminal law, but that the prevention purpose must be limited by the principle that "a finding of moral responsibility is a necessary although not a sufficient condition for determining criminal guilt and meting out punishment for it").

[65] Frase, *Punishment Purposes*, *supra* note 58, at 73.

[66] For a discussion of retributive and utilitarian theories as bases for determining the proportionality of punishment, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: Proportionality Relative to What?,* 89 MINN. L. REV. 571, 590–96 (2005). Professor Frase sees retributive proportionality as the approach invoked by the Supreme Court. *Id.* at 592. He identifies two proportionality concepts grounded in utilitarian theories that could be used to find punishment excessive. *Id.* He calls them "ends proportionality" (when the costs outweigh the benefits) and "means proportionality" (comparing the measure or sentence to less burdensome measure or sentences that will achieve the same benefits). *Id.* at 593–96. His discussion of the utilitarian proportionality concepts as applied to an evaluation of criminal sentences shows that these concepts do not operate apart from a retributive basis. In his view, the utilitarian "proportionality principle has important elements in common with retributive proportionality—in particular, both principles require proportionality relative to offense severity and measure the latter from the defendant's, not a public perspective"). *Id*. at 594.

[67] *See* Lee, *supra* note 52, at 739–40 (noting that utilitarian theories are unable to serve as a theory of proportionality).

[68] *Id.* at 740.

[69] Harmelin v. Michigan, 501 U.S 957, 986 n.11 (1991) (plurality opinion); *id.* at 1018 (White, J., dissenting); Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (plurality opinion); *id.* at 288 (Powell, J., dissenting).

[70] Lee, *supra* note 52, at 739–40.

[71] *See* Parr, *supra* note 52, at 60–62 (noting that retribution theory offers the only theoretical justification for proportionate punishment); Richard H. Andrus, Note, *Which Crime Is It? The Role of Proportionality in Recidivist Sentencing After* Ewing v. California, 19 BYU J. PUB. L. 279, 292 (2004)

one hundred outstanding parking tickets and a criminal history that includes ten prior parking violation convictions, a life imprisonment sentence could be justified under an incapacitation theory. This sentence would prevent this individual from committing further parking violations by removing him from the community. Like deterrence, incapacitation theory has no limiting principle apart from what is necessary to prevent further crimes by the offender.[72] Neither theory embodies a concept of proportionality based on the gravity of the crime, and neither theory limits punishment according to the wrongfulness of the conduct. Only the retribution theory limits punishment to the gravity of the crime and provides a principled basis for declaring the life sentence for the parking violator excessive and disproportionate to the wrong.

Because of the conflicts between utilitarian purposes and just deserts principles, most jurisdictions have adopted a model that uses retribution as a limitation on utilitarian goals.[73] This model, known as modified just deserts, "limiting retributivism,"[74] or retribution as a side constraint,[75] assigns primacy to principles of retribution by using just deserts for an offender's conduct to set both upper and lower limits on the severity of penalties that may be imposed.[76] According to this model, utilitarian goals may be pursued within the limits of deserved punishment. Within this range, other sentencing goals, such as deterrence, incapacitation, and rehabilitation, may be appropriate in particular cases to determine the precise sentence to impose.[77] Using modified just deserts, the recidivist shoplifter may be punished more severely than a first offender in order to serve the incapacitation goal, but within the limits determined according to retribution principles.

Retribution theory offers the only principled way to evaluate punishment for excessiveness and to determine whether punishment is proportional to the crime. The principle that punishment should not be harsher than deserved—that punishment must fit the crime and should be

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("[A] sentence considered cruel or unusual under the retribution theory of punishment will not necessarily be cruel or unusual under incapacitation, deterrence, or rehabilitation theories."); *cf.* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 163–67 (1995) (claiming that utilitarian theories of punishment support a form of proportionality).

[72] Parr, *supra* note 52, at 60.

[73] For commentary on using retribution to limit utilitarian goals, see, for example, Richard S. Frase, *Limiting Retributivism*, in THE FUTURE OF IMPRISONMENT 83, 97–98 (Michael Tonry ed., 2004) [hereinafter Frase, *Limiting Retributivisim*]; Frase, *Punishment Purposes*, *supra* note 58, at 68; Frase, *supra* note 66, at 590–92.

[74] NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 161 (1982).

[75] Lee, *supra* note 52, at 743 ("The goals of incapacitation, deterrence, retribution, and rehabilitation can all be pursued under a regime with retributivism as a side constraint, as long as such pursuits do not violate the side constraint.").

[76] Frase, *Punishment Purposes, supra* note 58, at 76.

[77] *Id*. at 76–77.

measured by the gravity of the crime—provides a principled basis for assessing whether punishment is excessive or proportional. Other theories, like deterrence or incapacitation, permit penalties that would not be allowable under the retributivist theory. As Justice Scalia pointed out, "proportionality is inherently a retributive concept" and "it becomes difficult even to speak intelligently of 'proportionality' once deterrence and rehabilitation are given significant weight."[78]

Although a pure retributive model of punishment would require strict proportionality between the offense/offender and the penalty, the notion of just deserts as applied to concrete cases lacks precision.[79] It is a near impossible task to say that this degree of wrongfulness deserves only this degree of punishment. The questions of what crimes deserve harsher punishment and what that punishment should be are highly contestable.[80] Punishment need only fit the crime in a broad sense. Whereas there may be wide disagreement as to the particular penalty a particular conduct deserves, there will be greater consensus as to the range of proper punishment for that conduct.[81] As a result, the proportionality principle requires only a rough proportionality based on a defined range of punishment for certain conduct with a definite upper limit.

III. PUNITIVE DAMAGES AS PUNISHMENT

The imposition of punitive damages above and beyond any compensation to the victim clearly serves only one purpose—the punishment of the defendant.[82] Punitive damages do not compensate other victims who are not before the court,[83] and hence only serve the goal of punishing the wrongdoer. With full compensation, the only function served by punitive damages is punishment.[84] Attempts to characterize punitive damages as a type of broadened compensation,[85] as social

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[78] Harmelin *v.* Michigan, 501 U.S. 957, 989 (1991) (plurality opinion).

[79] *See* MORRIS, *supra* note 74, at 198–99 (arguing that the concept of just desert is inherently imprecise).

[80] Lee, *supra* note 52, at 744.

[81] Frase, *Punishment Purposes, supra* note 58, at 77.

[82] *See*, *e.g.*, Fellmeth, *supra* note 26, at 743 (punitive damages no longer serve any substantial remedial function and are being used for retributive or deterrent purposes).

[83] Unlike the proposal of Professor Sharkey, *Punitive Damages as Societal Damages, supra* note 6, at 352, punitive damages today do not go to other victims harmed by the defendant; rather, statewide class damages can be awarded to a single plaintiff. Even if the plaintiff must split the punitive damages award with the state, the nature of the damages is still punitive since it goes beyond compensation.

[84] *See, e.g.,* Fellmeth, *supra* note 26, at 747–48 (arguing that where the function and effect of damages are to compensate the plaintiff, even for attorney's fees, they should be considered further remedial compensation and not punitive).

[85] This term is used by Professor Zipursky to describe those theories of punitive damages that view such damages as expanded compensatory damages. He includes in this category compensation for intangibles. Zipursky, *supra* note 9, at 138. *See* Redish & Mathews, *supra* note 8, at 14–15 (observing that punitive damages are an offshoot of the broader concept of exemplary damages).

damages,[86] or as a type of lesser punishment different from criminal punishment[87] fail to admit the nature of punitive damages as pure punishment.[88] Nor does it matter that the punitive damages award goes to the plaintiff rather than the state. "The question of where the award goes is conceptually independent of the question of whether the defendant [is punished by paying the award]."[89]

The United States Supreme Court has recognized that the purpose of punitive damages is punishment. According to the Court, compensatory and punitive damages serve different purposes. Compensatory damages redress the loss suffered by the plaintiff, and punitive damages serve a broader purpose aimed at retribution and deterrence.[90]

Significantly, the Court has referred to punitive damages as serving a state interest rather than private interests. In *BMW of North America, Inc. v. Gore,* the Court stated that "[punitive damages] further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[91] This legitimate interest is also served by criminal sanctions. Viewing retribution and deterrence as state functions, the Court in *Cooper,*

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[86] *See, e.g*., Sharkey, *supra* note 6, at 351, 354. Professor Sharkey proposes a new category of damages—compensatory societal damages—that she claims are an unacknowledged component of punitive damages. *Id.* at 351–52. Professor Sharkey sees punitive damages as furthering a societal compensation goal of redressing harms to others besides the plaintiff in a particular case, and she proposes that this goal be recognized and furthered by using the additional damages to create a pool of money to compensate other victims who are not before the court. *Id*. at 353–54, 389.

[87] Professor Zipursky describes two theories of punitive damages that attempt to justify punitive damages as lesser punishment. In the private wrong theory advanced in Thomas B. Colby*, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003), punitive damages intended to redress private wrongs do not require the protections required for criminal punishment of public wrongs. In the private prosecution theory developed by Marc Galanter and David Luban in *Poetic Justice: Punitive Damages and Legal Pluralism*, *supra* note 6, at 1457–58, punitive damages sought by private parties, rather than the government, do not call for the same constitutional protections required for criminal punishment sought by the State. Professor Zipursky sees both theories as inadequate to distinguish punitive damages from punishment akin to criminal punishment. *See* Zipursky, *supra* note 9, at 142–46 (discussing societal damages—the redress of harms caused by the defendant who injured persons beyond the individual plaintiff).

[88] For a useful critique of these attempts to characterize punitive damages as something other than retributive punishment, see Zipursky, *supra* note 9*,* at 146–49. Even Professor Zipursky's attempt to develop a theory of punitive damages as having a double aspect, a civil aspect based on a plaintiff's right to be punitive, and a criminal aspect based on society's need to punish, fails in its ability to separate these aspects in a punitive damages award. In his view, if, in a particular punitive damages award, the civil aspect predominates, it would not merit the special constitutional scrutiny like proportionality. If, on the other hand, the particular award reflected society's need to punish for retribution or deterrence, then this criminal aspect should require constitutional protections. *See id.* at 106–07 (discussing the tension between punitive damages as civil punishment versus punitive damages as criminal punishment). This distinction does not matter to defendants who are ordered to pay money in excess of what is necessary to compensate the plaintiff. In either aspect, punitive damages are punitive in form as well as in substance.

[89] *Id.* at 154.

[90] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 416 (2003); *see also*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence.").

[91] BMW of N. Am., Inc. v. Gore *,* 517 U.S. 559, 568 (1996).

BMW and *State Farm* treated punitive damages, not as compensation to victims or to society, but as punishment akin to criminal sanctions. Both criminal sanctions and punitive damages serve social goals of retribution and deterrence that go beyond private interests in receiving compensation for harms suffered. And both criminal sanctions and punitive damages "are authorized by and enforced by organs of the state (courts)."[92]

Punitive damages, like criminal sanctions, also carry a stigma.[93] The fact that juries are instructed that punitive damages must be based on wrongdoing means that punitive damages awards express condemnation in the same way that a criminal conviction does.[94] An award of punitive damages communicates public disapproval of the defendant's conduct in the same way that a criminal fine does. It makes no difference that a private party, rather than the government, seeks the punitive damages award.[95] The authority of a private party to pursue punitive damages comes from the state, authorized by the legislature or the courts.[96]

IV. PUNITIVE DAMAGES AND PROPORTIONALITY

The United States Supreme Court has treated punitive damages as a type of punishment subject to a proportionality requirement. Although punitive damages awards are not subject to the Cruel and Unusual Punishment Clause or the Excessive Fines Clause, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[97] In addition to constitutional limits, a "common law standard of excessiveness" limits punitive damages in federal maritime cases.[98] Stating that punitive damages awards serve the same purpose as criminal penalties, the Court expressed concern that "punitive damages pose an acute danger of arbitrary deprivation of property"[99] because of the wide discretion allowed juries in

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[92] Fellmeth, *supra* note 26, at 744.

[93] *See id*. at 741–42 ("Punitive damages also parallel criminal fines that they may express social condemnation and carry stigma similar to criminal conviction.").

[94] In this sense, punitive damages are justified primarily on a retribution theory even though punitive damages also serve a deterrence function. For an argument that the retributive goal outweighs the deterrence function, see Zwier, *supra* note 6, at 419–27, 429 (arguing that punitive damages serve a corrective function based on just desert and retribution and pointing out the problems with a utilitarian/consequentialist approach based on optimum deterrence).

[95] Fellmeth, *supra* note 26, at 715.

[96] *See id.* ("[T]he plaintiff has no authority or power to seek and collect punitive damages except as explicitly authorized and empowered by the appropriate legislature and courts.").

[97] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 416 (2003).

[98] Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 28 (U.S. June 25, 2008).

[99] *Id.* at 417 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)). Professor Fellmeth sees deprivations of property for punishment purposes as requiring the same procedural protections that are considered necessary in criminal imprisonment cases. He points out that "deprivations of property are adequately serious threats to personal liberty and dignity" to warrant heightened procedural protections. Fellmeth, *supra* note 26, at 711. Although he focuses on procedural protections, the

setting the amount of an award. To address this concern, the Court has imposed both procedural and substantive limitations on the award of punitive damages.[100] The procedural limitations include a requirement of judicial review of punitive damages awards[101] and a requirement of de novo judicial review.[102] In addition, the Court expressed the related concern about the lack of fair notice as to the severity of the punishment that may be imposed.[103] According to the Court, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[104] In view of these concerns, the Court decided that the Due Process Clause imposes substantive limits on the jury's discretion to award punitive damages and that excessive awards will be rejected as arbitrary and unconstitutional.[105] The Court also implied that Due Process concerns may limit multiple punitive damages awards to different plaintiffs based on the same conduct.[106]

The United States Supreme Court in *BMW of North America v. Gore* for the first time vacated a punitive damages award as excessive under the Due Process Clause.[107] A jury in Alabama awarded Dr. Gore

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requirement of limits on punishment should be the same for both money penalties and imprisonment. *Id.*

[100] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) (" [The] Court has found that the Constitution imposes certain limits, in respect both to procedures . . . and to amounts forbidden as 'grossly excessive.'").

[101] *Honda Motor Co.*, 512 U.S. at 432.

[102] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 441, 443 (2001).

[103] *State Farm*, 538 U.S. at 416–17.

[104] BMW of N. Am., Inc. v. Gore , 517 U.S. 559, 574 (1996); *see* Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 29 (U.S. June 25, 2008) ("[A] penalty should be reasonably predictable in its severity.").

[105] *State Farm*, 538 U.S. at 417. Interestingly, the guideposts adopted by the Court to determine whether a punitive damage award is excessive provide little in the way of notice as to the severity of the punishment in dollars that may be awarded. Only the ratio guidepost gives some notice as to the extent of punitive damages that may be awarded, but even that guidepost does not provide definite notice because the ratio depends on the compensatory damages and may vary within single digits. *See also* Zipursky, *supra* note 9, at 118 (noting that the analysis in *BMW* concerning the three guideposts does not address the issue of notice).

[106] *See State Farm,* 538 U.S. at 423 ("Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct."). The issue of multiple punitive damage awards is a topic beyond the scope of this Article. For a recent review of this issue and a proposed solution, see Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1653–54 (2005) (proposing that defendants who register a punitive damage award in a national registry be entitled to a dollar for dollar credit against any future punitive damage award based on the same conduct).

[107] *BMW*, 517 U.S. at 568. The Supreme Court had previously recognized that the Due Process Clause prohibits excessive awards, but the Court had never vacated an award of punitive damages until *BMW*. *See, e.g.*, *Cooper Indus.*, 532 U.S. at 433 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–54, 465–66 (1993) (noting that previous Supreme Court decisions held that the Due Process Clause imposed a substantive limit on punitive

compensatory damages of $4000 and punitive damages of $4 million, later reduced to $2 million by the Alabama Supreme Court.[108] Dr. Gore sued BMW of North America after discovering that his BMW sedan, which he purchased for just over $40,000, had been repainted before it was sold to him as new without his knowledge.[109] BMW, pursuant to a nationwide policy, repaired cars that were damaged in the course of manufacture or transportation, and if the cost of the repairs did not exceed three percent of the car's retail price, the car was sold as new without disclosure of the repairs.[110] Because the cost of repainting Dr. Gore's car was less than two percent of the price, BMW did not disclose the repair to the dealer or Dr. Gore.[111] Dr. Gore based his claim for punitive damages on evidence that, since 1983, BMW had sold 983 refinished cars as new, including fourteen in Alabama, without disclosure.[112] Dr. Gore argued that that the loss in value of each car was about $4000 and "that a punitive damages award of $4 million would provide an appropriate penalty for selling approximately 1000 cars for more than they were worth."[113]

A. *Proportionality Guideposts*

To determine whether a punitive damages award is excessive under the Due Process Clause, the United States Supreme Court adopted three guideposts in *BMW of North America v. Gore*[114]—degree of reprehensibility,[115] ratio of punitive damages award to compensatory damages,[116] and sanctions for comparable misconduct.[117] Applying these guideposts to the Alabama Supreme Court's award, the Court found the punitive damage award of $2 million against BMW was excessive.[118]

The United States Supreme Court applied the *BMW* guideposts in the more recent case of *State Farm v. Campbell,* concluding that the $145 million punitive damages award against State Farm was excessive under the Due Process Clause.[119]

Campbell, insured by State Farm, sued State Farm in a bad faith action after State Farm refused to settle the claim against Campbell for the policy

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damage awards); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991) (holding that the punitive damages award was not a violation of the Due Process Clause).

[108] *BMW*, 517 U.S. at 565, 567.

[109] *Id.* at 563.

[110] *Id.* at 563–64.

[111] *Id.* at 564.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 574–75.

[115] *Id.* at 575.

[116] *Id*. at 580.

[117] *Id.* at 583.

[118] *Id.* at 585–86.

[119] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 425–26, 429 (2003).

limit and then refused to cover the jury award in excess of the policy limit.[120] State Farm also declined to post an appeal bond, and a State Farm agent told Campbell, "You may want to put for sale signs on your property to get things moving."[121] The jury awarded compensatory damages of $2.6 million and punitive damages of $145 million, which the trial court reduced to $1 million and $25 million, respectively.[122] The Utah Supreme Court, applying the guideposts from *BMW*, reinstated the $145 million punitive damages award.[123]

B. *Reprehensibility Guidepost*

The first guidepost from *BMW*, the degree of reprehensibility of the defendant's conduct, is the most important according to the Court.[124] This guidepost reflects a proportionality standard that measures the amount of the punitive damages award against the severity of the offense. According to the Court, "some wrongs are more blameworthy than others," and punishment should reflect the gravity of the defendant's conduct.[125] In assessing the reprehensibility of the defendant's conduct, the Court articulated five relevant factors and a number of inappropriate ones. The relevant factors include (1) whether the harm caused was physical or economic;[126] (2) whether the conduct showed an indifference to or a reckless disregard of the health or safety of others;[127] (3) whether the conduct targeted a financially vulnerable victim;[128] (4) whether the conduct involved repeated actions;[129] and (5) whether the harm resulted from intentional malice, trickery, or deceit, or from accident.[130] The United States Court of Appeals for the Ninth Circuit has added another factor for evaluating reprehensibility—mitigation efforts by the defendant to ameliorate any harm.[131] These factors, in large part, focus on the culpability of the defendant, rather than on the harm caused. Only the first factor focuses on the harm. The others relate to the defendant's state of

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[120] *Id.* at 413.
[121] *Id.*
[122] *Id.* at 415.
[123] *Id.*
[124] BMW of N. Am., Inc. v. Gore , 517 U.S. 559, 575 (1996).
[125] *Id.*
[126] *Id*. at 576. The Ninth Circuit considered mental distress caused by economic injury as a factor that makes conduct more reprehensible. *See In re* Exxon Valdez, 490 F.3d 1066, 1086 (9th Cir. 2007) ("The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus Exxon's reprehensibility goes considerably beyond the mere careless imposition of economic harm.").
[127] *BMW*, 517 U.S. at 576.
[128] *Id.*
[129] *Id.* at 577.
[130] *Id.* at 576.
[131] *Exxon Valdez*, 490 F.3d at 1084 ("Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.") (quoting *In re* Exxon Valdez, 270 F.3d 1215, 1242 (9th Cir. 2001)).

mind, using the concept of *mens rea* to determine the degree of reprehensibility—the more intentional or reckless the conduct, the more reprehensible.

Applying these reprehensibility factors in *BMW*, the Court concluded that none of the factors supported reprehensibility.[132] The harm caused was purely economic,[133] BMW's conduct did not show reckless indifference for the health and safety of others,[134] and the evidence disclosed no deliberate false statements, affirmative misconduct, concealment of evidence, or improper motive.[135] Although the Court recognized that repeated misconduct may be relevant to the reprehensibility analysis, it rejected the argument that BMW's conduct was particularly reprehensible because of its nationwide practice of not disclosing presale refinishing of cars.[136] The Court noted that BMW's practice was not unlawful in every state and that its nationwide practice did not constitute repeated misconduct that reflected more reprehensibility than a single instance of misconduct.[137] The Court thus concluded BMW's conduct was not sufficiently reprehensible to warrant a substantial punitive damages award of $2 million.[138]

In *State Farm*, the United States Supreme Court reviewed the $145 million award in light of *BMW's* principles and found the award excessive. Applying the reprehensibility factors identified in *BMW*, the Court found that State Farm's conduct, while reprehensible, was not so egregious as to merit a punitive damages award of $145 million.[139] In addition, the Court noted that the award was based on inappropriate evidence of reprehensibility. It rejected as part of the reprehensibility analysis the Utah court's reliance on out-of-state conduct,[140] harm caused to other people by dissimilar misconduct,[141] and wealth of the defendant.[142] Although the Court in *State Farm,* as it did in *BMW,* recognized that repeated misconduct tends to show a greater degree of reprehensibility, it said that the misconduct must be of the same type that injured the plaintiff.[143] As a result, the Court limited the consideration of prior bad acts of the defendant to those similar to the misconduct that caused the plaintiff's harm.[144] The Court, concerned that the reprehensibility guidepost not be expanded to

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[132] *BMW*, 517 U.S. at 576.
[133] *Id.*
[134] *Id.*
[135] *Id*. at 579.
[136] *Id.* at 576–77.
[137] *Id.* at 576–78.
[138] *Id.* at 578.
[139] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 419–20 (2003).
[140] *Id.* at 428.
[141] *Id.* at 422–23.
[142] *Id.* at 427 (citing BMW of N. Am., Inc. v. Gore , 517 U.S. 559, 585 (1996)).
[143] *Id.* at 423.
[144] *Id.* at 423–24.

permit a defendant to be punished for any wrongs in the past, limited the evidence relevant to the reprehensibility evaluation.[145]

A more recent case, *Philip Morris USA v. Williams*, requires trial courts to protect against juries misusing evidence of harm to others.[146] Punitive damages cannot punish for the harm caused to others,[147] and trial courts must ensure that juries do not punish a defendant for injuries inflicted on nonparties.[148] The Court recognized and approved evidence of harm to others as relevant to the reprehensibility analysis, stating that harm to others may show greater reprehensibility,[149] but the Court expressed concern that juries may misuse this evidence to punish a defendant for harm caused to others not involved in the litigation.[150] The Court characterized as significant the risk that juries may misunderstand the two uses of this evidence and imposed on trial courts the obligation to protect against that risk.[151]

The Court's discussion in *State Farm* of the defendant's wealth in assessing the excessiveness of a punitive damages award reflects a retributive view of punitive damages. *State Farm* rejected the defendant's wealth as a factor that bears a relationship to an award's reasonableness or proportionality to the harm,[152] and cautioned against relying on wealth to justify an otherwise unconstitutional punitive damages award. In essence, wealth has nothing to do with the wrongfulness of conduct, except, perhaps, for the unusual situation where a defendant uses his wealth to do more harm. In such a case, the wealth becomes part of the wrongful conduct.[153] Consideration of a defendant's wealth would be relevant under

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[145] *Id.* at 424. For a comparison of how the United States Supreme Court permits the use of prior wrongdoing in criminal sentencing and punitive damages, see Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1611 (2005) (stating that "sentences of criminal offenders are enhanced without regard for whether their prior offenses occurred outside the forum state," but noting that extraterritorial wrongdoing is permitted a limited role in the formulation of punitive damage awards).

[146] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007).

[147] *Id*. at 1063 ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . .").

[148] *Id.* at 1064 ("We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.").

[149] *Id.* at 1065 ("[W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.").

[150] *Id*. ("How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others?").

[151] *Id*. ("[W]e believe that where the risk of that misunderstanding is a significant one . . . a court, upon request, must protect against that risk."). The Court did not specify how courts should protect against this risk and instead left it to the States to determine how to assure that juries do not misuse evidence of harm to others. *Id*.

[152] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 427 (2003).

[153] *See, e.g.,* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (holding that *State Farm* does not preclude consideration of defendant's worth if used to mount an extremely aggressive defense that makes litigation costly for plaintiffs).

a deterrence theory that would impose enough punishment to make the pain exceed any benefit. Retribution theory, however, does not require that wealthy defendants feel the pain of monetary punishment. Retribution measures the punishment by the degree of wrongfulness, and how a punished person feels about a punitive damages award, fine, or prison term says nothing about the wrongfulness of the conduct.

C. *Ratio Guidepost*

The Court in *BMW* also evaluated the punitive damages award under the second guidepost, the ratio of the punitive damages to compensatory damages. Stating that punitive damages must bear a reasonable relationship to the harm done,[154] the Court refused to specify a ratio that marks the line between reasonable and unreasonable punitive damages.[155] The Court, however, provided some guidance as to an acceptable ratio when it referred to previously approved ratios of 4:1 and 10:1 from earlier cases.[156] Because the $2 million punitive damages award against BMW was five-hundred times the harm to Dr. Gore, the Court viewed the 500:1 ratio as "breathtaking" and unacceptable.[157]

Evaluating the $145 million punitive damages award in *State Farm* under the ratio guidepost, the Court found that the ratio of 145:1 was excessive. As in *BMW*, the Court declined to impose a ratio cap on punitive damages, but it clearly signaled that punitive awards with a ratio above 9:1 would be excessive. As the Court put it, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[158] At the same time, the Court indicated that punitive damages awards with ratios of up to 4:1 would be acceptable in view of the Court's approval of these single-digit ratios in past cases.[159] According to the Court, the punishment must be proportionate, not only to the misconduct, but also to the amount of harm

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[154] BMW of N. Am., Inc. v. Gore , 517 U.S. 559, 580 (1996).

[155] *Id.* at 582. In contrast, the Court did adopt a fixed ratio cap in the exercise of its common law authority to regulate punitive damages in federal maritime cases. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 28 (U.S. June 25, 2008).

[156] *Id.* at 581 (referring to a 4:1 ratio in Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991), and a 10:1 ratio in TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 472 (1993) (O'Connor, J., dissenting)).

[157] *BMW*, 517 U.S. at 583.

[158] *State Farm*, 538 U. S. at 425.

[159] *Id.* The Court has also upheld punitive damages ratios substantially above 10:1. The Court has upheld a punitive award 106 times compensatory damages. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) (upholding compensatory damages of $51,146 and punitive damages of $6,000,000). Similarly, in *TXO*, the court upheld an award 526 times the compensatory damages. *TXO,* 509 U.S. at 451 (upholding compensatory damages of $19,000 and punitive damages of $10,000,000).

caused to the plaintiff.[160]

The Court also included potential harm as part of the ratio guidepost,[161] but did not indicate how potential harm should be determined or how it should be measured in dollar terms for purposes of determining the appropriate ratio between potential harm and the punitive damages award. A ratio based on actual compensatory damages is easy to calculate, but the Court gave no guidance as to how potential harm to others should be valued. As a result, lower courts have differed in their use of potential harm in the ratio analysis.[162]

Two cases from different jurisdictions involving the same defendant tobacco company viewed potential harm quite differently. The California Court of Appeals recognized the potential harm beyond the actual harm suffered by the plaintiff smoker,[163] but did not take potential harm into account in its ratio analysis.[164] As a result, the California Court of Appeals found the 17:1 ratio of punitive damages to compensatory damages unconstitutional.[165] In contrast, the Oregon Supreme Court focused on both the actual harm to the plaintiff and the potential harm caused by the defendant to other smokers in Oregon in justifying a punitive damages award of $79.5 million, a 96:1 ratio based on the compensatory damages.[166] These two cases illustrate the divergent approaches to the ratio guidepost and the difficulty of applying a ratio analysis to a harm that is not reduced to a dollar figure.

The *State Farm* case refined the ratio guidepost, and, in doing so, made it more significant than the reprehensibility guidepost.[167] By signaling what ratios will likely be excessive and what ratios will likely be acceptable, the Court has made this guidepost the easiest to apply. Notwithstanding its efforts to disclaim any bright line ratio that marks the

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[160] *State Farm*, 538 U.S. at 426. For a critique of the Court's linking punitive damages awards to compensatory damages and limiting punitive damages to a single-digit ratio, see Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation,* 79 NOTRE DAME L. REV. 2025, 2030–31 (2004). Professor Yeazell found empirical support for the 9:1 ratio in a study by Theodore Eisenberg showing that eighty percent of all punitive damages awards did not exceed 8.117 times the compensatory damages; the study was not cited by the Court in *State Farm*, although two amicus briefs cited the Eisenberg study. *Id*. at 2039.

[161] *State Farm*, 538 U.S. at 424–25. The Court in *Philip Morris USA* limited potential harm to that caused to the plaintiff. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

[162] *See* Jiang, *supra* note 9, at 802–06 (2006) (stating that lower courts have struggled to define potential harm and have come to different conclusions as to how and whether to use potential harm in the ratio calculation).

[163] Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42, 81–82 (Cal. Ct. App. 2003).

[164] *Id.* at 85.

[165] *Id.*

[166] Williams v. Philip Morris Inc., 127 P.3d 1165, 1171, 1182 (Or. 2006).

[167] *See* Andrew C.W. Lund, *The Road From Nowhere? Punitive Damage Ratios After* BMW v. Gore *and* State Farm Mutual Automobile Insurance Co. v. Campbell, 20 TOURO L. REV. 943, 984 (2005) (indicating that in *State Farm*, the Court subordinated the reprehensibility factor to the ratio guidepost).

due process limit on punitive damages, the Court's references to excessive and reasonable ratios invites reliance on this guidepost for assessing the excessiveness of particular awards. As a result, this guidepost has the most bite in curbing excessive awards. Indeed, cases following the *State Farm* decision seem to have focused largely on the ratio in evaluating the propriety of the award.[168]

The Court's reliance on the ratio between punitive damages and compensatory damages means that the punishment must be proportional to both the misconduct and the injury suffered by the plaintiff. In essence, there are two proportionality requirements—the award must be proportional to the wrongful conduct (reprehensibility analysis) and proportional to the harm suffered (ratio analysis).[169] Because it is easy to multiply compensatory damages by some ratio and because of the guidance provided by the Court in terms of acceptable and unacceptable ratios, the second guidepost has shifted the proportionality analysis focus from the wrongful conduct to the harm caused. It is much more difficult to determine the degree of reprehensibility than to apply a ratio, and even if the degree of reprehensibility could be determined with some certainty or agreement, the further task of assigning a dollar figure to it becomes a nearly impossible guess. Although the Court said that State Farm's conduct was reprehensible and did not justify an award of $145 million, it is significant that the Court did not say what was the degree of reprehensibility or what would be proper punishment in dollars for State Farm's wrongful behavior.[170] In essence, the difficulty of applying the reprehensibility analysis[171] means that courts, including the Supreme Court, find it easier to rely on the ratio of punitive damages to

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[168] *See* Charles S. Doskow, *The State Farm Punitive Damage Multiplier in the Courts: Early Returns*, 17 ST. THOMAS L. REV. 61, 71–80 (2004) (observing that, on remand from the United States Supreme Court, state courts generally reduce punitive damage verdicts to single digit sums, and that courts reviewing verdicts either reduce the award to a single digit ratio or uphold the verdicts by re-characterizing the amount of the compensatory damages); *see also* McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (anointing ratio analysis "the most potent ingredient in the witch's brew"); Eden Elec., Ltd. v. Amena Co., 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003) (holding that even where reprehensible considerations are present, ratio cannot exceed 10:1); TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 450 (S.D.N.Y. 2003) (stating that the United States Supreme Court's ratio rulings are quite audible).

[169] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U. S. 408, 425–26 (2003).

[170] The Court indicated, however, that application of the three BMW guideposts, especially in light of the substantial compensatory damages, "likely would justify a punitive damages award at or near the amount of the compensatory damages." *Id.* at 429.

[171] The difficulty of evaluating the reprehensibility of conduct is vividly illustrated by the very different conclusions regarding the reprehensibility of State Farm's conduct by the United States Supreme Court (not so reprehensible as to justify the award) and the Utah Supreme Court (egregious and abusive conduct justifying a very high award). *See* Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 414, 420 (Utah 2004) (finding State Farm's behavior to be so egregious as to warrant the large punitive damages award, only to have the award overturned by the Supreme Court); *see also* Jiang, *supra* note 9, at 801–02 (2006) (criticizing the reprehensibility factor in the proportionality analysis because of its fluidity).

compensatory damages to assess excessiveness under the Due Process Clause. Reliance on the ratio for proportionality analysis may also reflect a preference for a guidepost that has a quantitative basis and makes judicial judgment about the proper limit of punishment in a particular case seem less arbitrary.

How should a court decide what is the appropriate ratio? The Supreme Court has not provided much guidance for determining the appropriate ratio of punitive damages to harm. The Ninth Circuit has focused on the amount of compensatory damages and the egregiousness of the defendant's conduct in determining the multiplier.[172] Under this approach, the reprehensibility of the conduct informs the proper ratio: the greater the reprehensibility the higher the ratio. Using this framework, the Ninth Circuit applied a ratio of 5:1 in the *Exxon Valdez* case producing a punitive damages award of $2.5 billion.[173]

The use of compensatory damages as part of the proportionality analysis may also reflect the notion that the harm caused by wrongful conduct should figure in measuring reprehensibility.[174] Criminal codes typically measure the wrongfulness of conduct according to the harm caused. For example, killing another is viewed as more serious than severely injuring a person, and punishment schemes reflect this hierarchy of wrongfulness by punishing a homicide much more severely than an assault with intent to commit murder, even though the conduct and culpability that produced the death or injury are the same.[175] As a result, two defendants who commit the same act with the same culpability of intent to kill will receive different punishment depending on whether their victims die or live.

Although traditional criminal law does take harm into account in grading the severity of different crimes, this feature of criminal law has its critics. According to these critics, the harm caused by the misconduct says little about the wrongfulness of the conduct.[176] The misconduct may result

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[172] *In re* the Exxon Valdez, 490 F.3d 1066, 1093 (9th Cir. 2007); *see* Planned Parenthood v. American Coal. of Life Activists, 422 F.3d 949, 962 (9th Cir. 2005) (using a rough framework to determine the appropriate ratio: a four to one ratio is appropriate where there are significant economic but not particularly egregious conduct, a ratio above four is appropriate where there are significant economic damages and more egregious behavior, and a double digit ratio may be appropriate where there are insignificant economic damages but particularly egregious behavior).

[173] *Exxon Valdez*, 490 F.3d at 1095. This award was reduced to $507 million by the Supreme Court after adopting a ratio cap of 1:1. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 42 (U.S. June 25, 2008).

[174] Professor Karlan views compensatory damages as "an indication of the gravity of the offense that uses the very currency in which punishment is to be meted out." Karlan, *supra* note 9, at 907.

[175] *Compare* 18 U.S.C. §§ 1111(a)–(b) (2000) (authorizing death or life imprisonment for first degree murder and "any term of years" to life for second degree murder, and death or life imprisonment for first degree murder), *with* 18 U.S.C. § 113(a)(1) (2000) (authorizing up to twenty years imprisonment for an assault with intent to commit murder).

[176] *See, e.g.*, H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 52–53 (1965) (according greater punishment on the basis of the harm caused "conflicts with important principles of justice as

in no harm, little harm, or serious injuries to one or more persons. The drunk driver acts with the same culpability whether he kills someone, harms another's property, or avoids an accident. According to some criminal law theorists, defendants who engage in the same conduct with the same culpability should receive the same punishment without regard to the harm caused.[177] These theorists claim that the law should pay attention to the defendant's conduct and culpability rather than to results, which may be fortuitous. For these reasons, these critics suggest that punishment should be based solely on the conduct and culpability of the defendant and not on the results of that conduct.[178]

Nevertheless, legislatures do accord significance to resulting harm in ranking crimes for purposes of punishment. Even though consequences of conduct may be irrelevant to the culpability of the offender, legislatures view the occurrence and degree of harm as significant factors in determining the seriousness of an offense.[179] Legislatures regard offenses causing harm as more reprehensible, thus meriting more severe punishment than the same conduct without a harmful result. In addition, the seriousness of offenses also depends on the degrees of the harm caused. Legislatures have made the judgment that harmful results count in grading crimes and punishment.

The United States Supreme Court also considers resulting harm as relevant to its proportionality analysis under both the reprehensibility and ratio guideposts. The Court listed harm, including harm to others, as one of the factors to be considered in the reprehensibility analysis,[180] and the

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between different offenders which would prima facie preclude treating two persons . . . differently because of a fortuitous difference in the outcome of [their] acts."); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497, 1601–03 (1974) [hereinafter Schulhofer, *Harm and Punishment*] (arguing that the objectives of criminal law are best served when punishments are based on the conduct and not on the result); *see also* Stephen J. Schulhofer, *Attempt*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 96–97 (Sanford H. Kadish ed., 1983) (questioning the rationales for different punishments for attempts that result in no harm and for the same conduct causing harm). *But see* C. L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 155 (1987) (stating that "the moral seriousness of an offense is a function of two major factors—the harm done and the culpability of the offender").

[177] *See, e.g.*, ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 153–54 (1983) ("[A]n offender ought only to be held responsible for that which he chose to bring about, or at least chose to risk.").

[178] *See, e.g.*, Schulhofer, *Harm and Punishment*, *supra* note 176, at 1605–07 (arguing for the abolition of results-based sentencing). For example, one victim of an assault may die because of a preexisting medical condition, while another victim of a similar assault may survive the attack because of the prompt response of emergency personnel. The conditions that determine whether a victim lives or dies are countless, and, for the most part, unaffected by the defendant's conduct or culpability.

[179] *See id.* at 1498–99 (noting that "every American criminal code [in additional to the Model Penal Code] relates the gravity of the crime to the results of the conduct").

[180] *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063–64 (2007) (accepting the claim that demonstrating harm to nonparties can help prove reprehensibility); State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic . . . .");

Court essentially gives the harm caused an outcome-determinative role under the ratio guidepost. Because the amount of compensatory damages measures the harm done, the ratio guidepost may produce a punitive damages award that does not reflect the reprehensibility of the defendant's conduct.[181] The Court recognized the possibility of an incongruity between reprehensibility and harm when it stated that in some cases the harm caused may not reflect the reprehensibility of the defendant's conduct, noting that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages."[182] In addition, "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[183] These statements suggest that, at least in some cases, compensatory damages provide little or no guidance in the proportionality analysis, and that the egregiousness or reprehensibility of the conduct is the proper benchmark. The notion that compensatory damages may not reflect the wrongfulness of unlawful behavior may explain the willingness of circuit courts to allow higher ratios in cases where the defendant violated the plaintiff's constitutional rights and the plaintiff suffered little in the way of damages to be compensated.[184]

D. *Sanction Comparison Guidepost*

Applying the third guidepost in *BMW,* the Court compared the punitive damages award to statutory fines in Alabama and other states for similar conduct. The maximum civil penalty in Alabama for violation of the Deceptive Trade Practices Act was $2000; other states for similar conduct imposed maximum penalties ranging from $5000 to $10,000.[185] The Court found that the $2 million award against BMW greatly exceeded these

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BMW of North America v. Gore, 517 U.S. 559, 575–76 (1996) (explaining that some wrongs are more blameworthy than others and that nonviolent crimes are less serious than violent crimes).

[181] *See, e.g.*, Karlan, *supra* note 9, at 907–08 ("[C]ompensatory damages awards do not fully capture the magnitude of a defendant's wrongdoing in two ways relevant to determining punitive damages. As a matter of retribution, compensatory awards will understate the defendant's moral culpability in cases where the defendant's wrongful designs are not fully realized. Moreover, . . . a punitive damages award might also properly reflect 'the possible harm to other victims that might . . . result[] if similar future behavior were not deterred,' a harm obivously not captured in the compensatory award . . . .") (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993)).

[182] *BMW*, 517 U.S. at 582.

[183] *Id.*

[184] *See, e.g.*, Garrett T. Charon, Note, *Beyond a Bar of Double-Digit Ratios:* State Farm v. Campbell's *Impact on Punitive Damages Awards,* 70 BROOK. L. REV. 605, 630–31 (2005) (discussing circuit court decisions awarding large ratios of punitive damages to compensatory damages in cases where constitutional rights are at issue).

[185] *BMW, 517 U.S.* at 584.

statutory maxima and that none of these statutes provide notice that violations would subject the violator to a multimillion dollar penalty.[186]

The Court in *State Farm* refined the third guidepost from *BMW* by eliminating as a relevant comparison any criminal penalty for the same or similar conduct. Although the Court noted that a criminal penalty may reflect the seriousness of the wrongful conduct in a state, the Court stated that the authorization of criminal imprisonment is not much help in determining the dollar amount of a punitive damages award.[187] The Court cautioned against reliance on a relevant criminal prison term to justify a high award, probably because lower courts, interpreting this guidepost, saw criminal sanctions as justifying large awards.[188] Lower courts got the message and adopted the view that criminal penalties are not a factor that can be considered in the proportionality analysis.[189] Other courts, however, have stated that criminal penalties are relevant in assessing punitive damages but not in a way that provides any guidance in how criminal penalties inform the dollar amount of punitive damages.[190]

Comparison to relevant civil sanctions remains valid under the third guidepost, and the Court in *State Farm* relied on a Utah law for fraud that carried a $10,000 civil fine.[191] The Court found the $145 million punitive damages award dwarfed the civil fine for State Farm's misconduct.[192] What counts as civil penalties, however, is not clear. The Court found the most relevant civil penalty in the *State Farm* case to be the civil fine. Nevertheless, the Utah Supreme Court took a broader view of civil sanctions and considered the loss of a license to do business to be a civil penalty for comparison purposes.[193] The potential loss of business, according to the Utah court, would cost State Farm more than $10,000,

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[186] *Id.* at 583–84.

[187] State Farm Mut. Ins. Co. v. Campbell*,* 538 U.S. 408, 428 (2003).

[188] After *BMW* was decided, a number of large punitive damages awards were affirmed by courts relying on the existence of criminal prison terms for similar conduct. For examples of this practice, see the cases cited in Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the BMW/State Farm Guideposts,* 37 U. MICH. J.L. REFORM 441, 480 (2004). The Court in *State Farm* may have intended to stop that practice.

[189] *See, e.g.*, Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003); Bocci v. Key Pharm. Inc., 76 P.3d 669, 675–76 (Or. Ct. App. 2003).

[190] *See, e.g.,* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063–64 (2007) (accepting the claim that demonstrating harm to nonparties can help prove reprehensibility); *In re* Exxon Valdez, 296 F. Supp. 2d 1071, 1107–08 (D. Alaska 2004) (explaining that it is not unreasonable to evaluate the constitutionality of a punitive damages award by taking into account whether the defendant had notice that its conduct could be subject to severe punishment).

[191] *State Farm*, 538 U.S. at 428. For a proposal to place greater reliance on the third guidepost, see Chanenson & Gotanda, *supra* note 188, at 478–87 (proposing a "presumptive limit" on punitive damages awards by focusing on comparable monetary fines authorized by statute).

[192] *State Farm,* 538 U.S. at 428.

[193] Campbell v. State Farm Mut. Auto Ins. Co.*,* 98 P.3d 409, 418–19 (Utah 2004).

further justifying the large punitive damage award.[194]

E. *Inadequacy of Guideposts for Determining Proportionality*

The disagreement in *State Farm* between the United States Supreme Court and the Utah Supreme Court regarding the amount of punitive damages demonstrates the difficulty in determining when the dollar amount of punitive damages crosses the line and becomes excessive. Both courts considered the award under *BMW's* three guideposts and came to very different conclusions. In addition, the S*tate Farm* decision shows that the United States Supreme Court gives little or no deference to the proportionality decisions of the jury or state supreme courts. In reviewing punitive damages awards for proportionality, the Court makes its own judgment regarding the reprehensibility of the defendant's conduct and its own judgment as to whether the amount of the award is proportional. Moreover, the Court has determined that a proportional award must be measured by a fairly strict ratio cap. The ratio basis for evaluating the proper proportionality of punitive damages cannot be defended on any principled basis by the Court. Any ratio, whether 4:1, 9:1, or double-digit to one, is arbitrary, and no principle supports one ratio over another.[195]

V. CRIMINAL SANCTIONS AND PROPORTIONALITY

The United States Supreme Court has taken a very different approach to the review of criminal sentences for proportionality. Unlike its stricter scrutiny of punitive damages awards under the Due Process Clause, the Court has adopted in the criminal sanction context a proportionality analysis that defers to the legislative judgment on the proper amount of punishment.[196] Only in death penalty cases does the Court undertake a strict proportionality review.[197] Even in death penalty cases, the Court's assessment of proportional punishment is influenced by legislative judgments.[198] Because the gravity of an offense is debatable and often the

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[194] *See id.* at 418 n.8 and accompanying text ("[W]e recognize that State Farm's behavior . . . may indeed be justification for termination of its license, a penalty that surely would cost it more than $10,000.").

[195] A ratio limit adopted by a legislature stands on a different footing. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 6 (U.S. June 25, 2008) (Stevens, J., dissenting) (state legislatures have imposed ratio caps and Congress could do so since "Congress is far better situated than is the Court to assess the empirical data, and to balance competing policy interests, before making such a choice").

[196] *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("[I]n assessing a punishment selected by a democratically elected legislature . . . we presume its validity.").

[197] Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 135 n.419 (2007).

[198] *See, e.g.*, *Gregg*, 428 U.S. at 173, 179–80 (1976) (indicating that the Court will look to objective indicia that reflect the public attitude toward a given sanction to determine whether the death penalty is proportionate to the offense, and noting that "the most marked indication of society's endorsement of the death penalty for murder" is that at least thirty-five states adopted some form of capital punishment in the wake of *Furman*) (citing Furman v. Georgia, 408 U.S. 238 (1972)). The

subject of disagreement,[199] the Court views legislatively authorized punishment for a crime as the most reliable measure of proportional punishment.[200] As a result, it upholds almost any criminal sentence that is challenged as excessive.[201] The critical difference between the Court's approaches in reviewing punitive damages and criminal sentences for excessiveness is the presence of legislative limits on criminal punishment and the absence of legislative limits on punitive damages awards. The Court, unwilling to second guess the legislative judgment, defers to the legislature's determination as to the proper amount of punishment. Only in the rare case where the Court considers the sentence to be grossly disproportionate to the crime will the Court disregard what the legislature regarded as appropriate punishment for the particular crime.[202]

In the criminal context, the Cruel and Unusual Punishment Clause includes a proportionality requirement, and as a result the Eighth Amendment imposes a limit on excessive or disproportional prison sentences.[203] The majority of the Court in *Solem v. Helm*, stating that both the death penalty and imprisonment must be proportionate to the crime,[204] rejected the dissenters' view that a proportional review of criminal sentences would thrust the Court into a line-drawing exercise that involves "visceral reactions of the individual Justices."[205] Responding to the dissent's view that proportionality review substitutes subjective judicial judgments for legislative judgments,[206] the *Solem* Court said that

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Court also relied on legislative judgments in deciding whether the death penalty applied to the mentally retarded and youthful offenders, and whether a death sentence was proportional punishment. Considering both the number of states prohibiting the death penalty in these cases and the direction of change away from the death penalty for these offenders, the Court concluded that a national consensus had developed against the death penalty for these groups. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) (establishing a national consensus by drawing parallels between state views regarding the execution of juveniles to the execution of mentally retarded people); Atkins v. Virginia, 536 U.S. 304, 316 (2002) (discussing the national consensus against the execution of mentally retarded individuals).

[199] *See, e.g.,* Karlan, *supra* note 9, at 888 ("[T]he seriousness of an offense is not a universal, timeless fact.").

[200] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 998–1000 (1991) (Kennedy, J., concurring); *see also infra* notes 202–09, 229–31 and accompanying text.

[201] *See, e.g.*, Ewing v. California, 538 U.S. 11, 14 (2003) (plurality opinion) (upholding a twenty-five years to life sentence); Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (upholding a fifty years to life sentence); *Harmelin*, 501 U.S. at 996 (plurality opinion) (affirming a sentence of life imprisonment without parole).

[202] Professor Karlan offers three circumstances where a court might look behind the authorized punishment in a statute and find a sentence disproportionate to the crime—(1) where the sentence imposed on a particular defendant fits the letter but not the spirit of the law, (2) where the maximum penalty is not reliable because political pressures led the legislature to ratchet up the sentence, and (3) where the legislature criminalizes and punishes behavior that should not be punished. Karlan, *supra* note 9, at 889–92.

[203] Writing for the majority, Justice Powell stated that the constitutional principle of proportionality in the Eighth Amendment has been recognized for almost a century. Solem v. Helm, 463 U. S. 277, 286–87 (1983).

[204] *Id.* at 287–88.

[205] *Id.* at 308 (Burger, J., dissenting).

[206] *Id*. at 314.

proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[207] The Court asserted that courts can determine the relative gravity of an offense for purposes of proportionality by comparing the severity of different crimes on the basis of accepted criteria such as the harm caused or threatened and the culpability of the offender.[208] Although the Court recognized that legislative judgments about the proper punishment for a criminal offense deserve substantial deference by the courts, the *Solem* majority viewed the Eighth Amendment as a limitation on the power of states to impose excessive punishment and that the determination of excessiveness could be based on objective criteria, not on the individual judgments of judges.[209]

Applying the objective factors to the criminal sentence imposed on Helm—life imprisonment without eligibility for parole—the Court concluded that the sentence was significantly disproportionate to his crime and excessive under the Eighth Amendment.[210] Helm was convicted of uttering a no account check for $100, an offense punishable by imprisonment up to five years.[211] Because he had been previously convicted of six felonies, including three burglaries, all nonviolent according to the Court, he was sentenced under the recidivist statute to life imprisonment without the possibility of parole.[212] The Court characterized the bad check offense as a "passive felon[y]" that involved neither violence nor threat of violence.[213] Although the Court recognized that recidivists may be punished more severely than first offenders, it emphasized that Helm's "prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person."[214]

Comparing Helm's sentence to other punishments, the Court concluded that in the same jurisdiction Helm had been punished as severely, or more severely, than criminals convicted of far more serious crimes, even taking into account his habitual offender status.[215] Comparing his sentence to the sentence that could be imposed in other jurisdictions for the same crime, the Court found that Helm was punished more severely

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[207] *Id.* at 292.
[208] *Id.* at 292–93.
[209] *Id.* at 289–90.
[210] *Id.* at 303.
[211] *Id.* at 281.
[212] *Id.* at 279, 281–82.
[213] *Id.* at 296 (quoting State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)).
[214] *Id.* at 296–97.
[215] *Id.* at 298–99.

than he would have been in almost any other state.[216] Based on its application of the objective criteria it adopted, the Court concluded that Helm's sentence was "significantly disproportionate" to his crime and thus prohibited by the Eighth Amendment.[217]

Although the Court in *Solem v. Helm* articulated a test based on three "objective factors"[218] similar to the guideposts utilized in punitive damage review cases, later decisions of the Court have modified the test so that the gravity of the offense has become the predominant factor.[219] Eight years after *Solem*, in 1991, the Court in *Harmelin v. Michigan* affirmed a sentence of life imprisonment without parole for the crime of possession of more than 650 grams of cocaine.[220] The concurring opinion of Justice Kennedy modified the three-part proportionality test of *Solem* by adopting "gross[] disproportiona[lity]" as the focus of the excessiveness determination.[221] Although Justice Kennedy's concurring opinion was joined by only two other justices, his approach was adopted by the majority in *Ewing v. California*, the Court's latest decision addressing the excessiveness of a criminal sentence.[222] Under that approach, if a sentence is not grossly disproportionate to the gravity of the offense, no comparative analysis of that sentence with other sentences within or outside the jurisdiction is required. As the concurring Justices put it, "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[223] In essence, the seriousness of the offense becomes the most important factor in the excessiveness determination. In Justice Kennedy's view, the seriousness of Harmelin's crime, juxtaposed with his sentence of life imprisonment without parole, did not give rise to an inference of gross disproportionality requiring comparative analysis.[224]

The proportionality test described in Justice Kennedy's concurring opinion in *Harmelin* provides for a deferential and limited review of criminal sentences for excessiveness. This gross disproportionality test sets an almost impossible standard and forgoes, except in rare cases, any comparative analysis of the sentence to other sentences in the same jurisdiction or in other states. Justice Kennedy relied on four principles to narrow the test adopted by the Court in *Solem*. The first three principles all

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[216] *Id.* at 299–300.
[217] *Id.* at 303.
[218] *Id.* at 290.
[219] Ewing v. California, 538 U.S. 11, 22 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1004 (1991) (Kennedy, J., concurring).
[220] *Harmelin*, 501 U.S. at 961, 996 (plurality opinion).
[221] *Id.* at 1001 (Kennedy, J., concurring).
[222] *Ewing*, 538 U.S. at 14.
[223] *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).
[224] *Id.*

involve substantial deference to legislatures with regard to the gravity of crimes and the punishment they deserve.[225]

These deferential principles almost entirely remove courts from any proportionality review of prison sentences.[226] The fourth principle removes any doubt that courts should avoid reviewing criminal sentences. According to this principle, the lack of clear standards to distinguish between sentences for different terms of years means that challenges to prison sentences based on the Eighth Amendment will rarely succeed.[227] This principle reflects the concern that judges should not substitute their own judgments about the gravity of offenses and proper punishments and sit as a superlegislature. Any review by courts, according to Justice Kennedy, should be informed by objective criteria,[228] and the lack of objective standards for judging whether prison terms are excessive means that successful challenges will be rare.[229] The restrictive proportionality test devised in *Harmelin* and applied in *Ewing* reflects the principles of deference to legislatures, federalism concerns, and the difficulty of judicial review.

The dissent in *Harmelin* disagreed that judicial review of prison sentences lacked any objective standards, and it would have applied the *Solem* three-part test.[230] Justice White, writing for the dissent, found objective criteria in both an intrajurisdictional and interjurisdictional analysis, and stated that a determination of "gross disproportionality" based on an analysis of the gravity of the offense and severity of the penalty must include comparisons to the punishment of other crimes in the same jurisdiction or the same crime in other states.[231] Otherwise, the Court's proportionality judgment would "have no basis . . . other than the subjective views of individual judges . . . ."[232] For the dissenters, the

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[225] *Harmelin,* 501 U.S. at 998–1000 (Kennedy, J., concurring). First, "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts." *Id*. at 998 (internal quotations omitted). Second, this deference extends to the theories of punishment that the legislature chooses to adopt in setting the penalties for different crimes. *Id*. at 999. Legislatures may choose to give different weights to different goals of punishment such as retribution, deterrence, incapacitation, or rehabilitation. And third, federalism concerns support substantial deference to different judgments in different states about the severity of offenses and the punishment they deserve. *Id.* According to this third principle, the Court would accept different and harsher prison terms for particular crimes based on "differing attitudes and perceptions of local conditions." *Id*. at 1000.

[226] For one commentator's argument that the approach taken by the Court in this case can be best understood as a rational scrutiny review of prison terms, similar to Fourteenth Amendment rationality scrutiny, see Michael P. O'Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences,* 72 TENN. L. REV. 1041, 1045 (2005).

[227] *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980) (plurality opinion)).

[228] *Id.* at 1000.

[229] *Id.* at 1001.

[230] *Id.* at 1009 (White, J., dissenting).

[231] *Id.* at 1021.

[232] *Id*. at 1020.

Solem test provides the proper assistance to courts in determining whether a particular prison term is excessive under the Eighth Amendment. Only by comparing sentences authorized for other crimes in the same state and sentences for the same crime in other states, "can a court begin to make an objective assessment about a given sentence's constitutional proportionality."[233] Such comparisons are the best and most reliable evidence of the gravity of a particular offense and excessiveness of the sentence imposed.[234]

In its latest decision reviewing a prison sentence under the Eighth Amendment, the Court in *Ewing v. California* used the *Harmelin* threshold test of gross proportionality instead of the *Solem* test.[235] Justice O'Connor's plurality opinion was joined by two other justices, and it adopted and applied the principles articulated by Justice Kennedy in *Harmelin*.[236] The Court's opinion asserted that the Eighth Amendment contains a "narrow proportionality principle" in non-capital cases.[237] Applying these principles to the twenty-five years to life sentence imposed on Ewing pursuant to California's three strikes law, the Court determined that this sentence was not grossly disproportionate to his crime and his status as a recidivist.[238] Ewing committed the crime of grand theft, a felony, by stealing three golf clubs, each worth $399, and concealing them in his pants as he limped out of the store.[239] Because he had previously been convicted of four serious or violent felonies—three burglaries and a robbery—he was sentenced under the three strikes law to a prison term of twenty-five years to life.[240]

The Court upheld the sentence imposed on Ewing by giving substantial deference to the legislative policy reflected in the California three strikes law. The plurality opinion stated that California made a deliberate policy choice that repeaters of serious or violent crimes must be isolated and that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."[241] Justice O'Connor concluded that recidivism has been recognized as a legitimate basis for increased punishment and that nothing in the Eighth Amendment prohibits California from incapacitating recidivists.[242] She added that the Court does

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[233] *Id*. at 1021.

[234] *See, e.g*., Karlan, *supra* note 9, at 893 ("[The] clearest and most reliable evidence of contemporary standards other than the authorized sentence is likely to involve how the defendant's offense fits into the structure of the state's penal code or how defendants convicted of similar offenses, either within or without the state, are being treated.").

[235] Ewing v. California, 538 U.S. 11, 23 (2003) (plurality opinion).

[236] *Id.* at 23.

[237] *Id.* at 20.

[238] *Id.* at 30.

[239] *Id.* at 17.

[240] *Id.* at 18, 20.

[241] *Id.* at 25.

[242] *Id.*

not sit as a "superlegislature" to second-guess California's policy choices.[243]

Against this backdrop, the plurality opinion examined the gravity of Ewing's offense and concluded that his offense of felony grand theft was a serious offense.[244] In addition, the Court looked at the prior convictions that supported the three strikes law and found that each of them was a serious felony.[245] Weighing the gravity of Ewing's offense in light of his history of recidivism against the long sentence imposed, the Court concluded that the sentence did not generate an inference of gross disproportionality.[246] Because the prison term did not meet the threshold determination of gross disproportionality, the Court did not compare Ewing's sentence with sentences for other crimes in California or with other sentences for the same conduct in other states.

Significantly, the *Harmelin*–*Ewing* test was endorsed by only three justices in each case.[247] Because two justices, Justices Scalia and Thomas, do not believe that the Eighth Amendment includes any kind of proportionality review of prison terms,[248] their two votes supported decisions in those cases rejecting a determination of excessiveness. The four justices who dissented in *Ewing* considered Ewing's sentence under the plurality's terms without adopting the test of the plurality,[249] finding that his sentence was grossly disproportional to his crime, even considering his prior record.[250] The dissenters rejected the view that reliance on any theory of punishment, like incapacitation based on a record of recidivism, could insulate a sentence from being excessive under the Eighth Amendment,[251] and concluded that recidivism plays a relevant, but not determinative role in the proportionality analysis.[252] According to the dissenters, the crime of conviction, here the theft of golf clubs, must be the focus of the review even in cases involving recidivist offenders.[253] With this focus, the dissenters found the theft offense triggering the sentence to be "among the less serious, while the punishment is among the most

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[243] *Id.* at 28.
[244] *Id.*
[245] *Id.* at 30.
[246] *Id.*
[247] In *Harmelin*, Justice O'Connor and Justice Souter joined Justice Kennedy's concurring opinion. Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). In *Ewing*, Chief Justice Rehnquist and Justice Kennedy joined Justice O'Connor's plurality opinion. Ewing v. California, 538 U.S. 11, 14 (2003) (plurality opinion).
[248] *See Ewing*, 538 U.S. at 31 (Scalia, J., concurring) (arguing that the Eighth Amendment does not include any kind of proportionality review of prison terms); *id.* at 32 (Thomas, J., concurring) (same).
[249] *Id.* at 36 (Breyer, J., dissenting).
[250] *Id.* at 37.
[251] *Id.* at 35 (Stevens, J., dissenting).
[252] *Id.* at 41 (Breyer, J., dissenting).
[253] *Id.*

serious."[254] Thus they required intrajurisdictional and interjurisdictional comparisons with Ewing's sentence. These comparisons disclosed that in California alone, nonrecidivist first degree murder carried the sentence imposed on Ewing,[255] but that outside California a recidivist convicted of the crime committed by Ewing would not be so severely punished.[256] The dissent's comparison of Ewing's case with two other recidivist cases decided by the Court, *Rummel* and *Solem*, placed Ewing's case closer to *Solem*, in which the Court found the sentence excessive under the Eighth Amendment.[257]

In a companion case to *Ewing*, the Court upheld a sentence of fifty-years-to-life (two consecutive twenty-five-years-to-life terms) under the California three strikes law. In *Lockyer v. Andrade*, the defendant was convicted of two felonies for stealing videotapes from a Kmart store on two different occasions by concealing them in his waistband; the first group of tapes he stole was worth $84.70 and the second group was worth $68.84.[258] Because he had a prior conviction, the two thefts could be charged under California law as felonies rather than as petty thefts.[259] And because Andrade had been previously convicted of three counts of first-degree residential burglary, he was sentenced under the three strikes law for each theft.[260]

The Court reviewed the federal habeas corpus challenge to Andrade's sentence under the limited review mandated by Congress.[261] According to the Court, the question was not whether the state court erred in affirming the sentence but rather whether the California Court of Appeals' decision was an unreasonable application of clearly established federal law.[262] Writing for the Court, Justice O'Connor concluded that it was not "objectively unreasonable" for the California Court of Appeals to affirm the fifty-years-to-life sentence in view of the lack of clarity of the federal law on the proportionality limits on prison sentences.[263] The Court stated that its precedents in this area have not established a clear or consistent path for courts to follow and that its cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.[264] As a result, according to the Court, the unclear governing legal principle regarding the proportionality requirement of the Eighth Amendment "gives

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[254] *Id.*
[255] *Id*. at 44.
[256] *Id.* at 47.
[257] *Id.* at 39.
[258] Lockyer v. Andrade, 538 U.S. 63, 66 (2003).
[259] *Id.* at 67.
[260] *Id.* at 68.
[261] *Id.* at 70–71 (discussing 28 U.S.C. § 2254(d)(1) (2000)).
[262] *Id.* at 71.
[263] *Id.* at 76.
[264] *Id*. at 72.

legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle—the 'precise contours' of which 'are unclear.'"[265]

The Supreme Court in *Ewing* and *Andrade* essentially abandoned any attempt to measure the proportionality of increased punishment for recidivist criminals. Although noting that increased sentences for repeat criminals have long been recognized by the Court,[266] the Supreme Court failed to articulate at what point an increased sentence for recidivism is excessive relative to the underlying crime or the prior criminal history.[267] Instead, the Court used a "gross disproportionality" test and deferred to the legislature's goal of incapacitating recidivists. This approach essentially insulates habitual offender sentence enhancements from proportionality review. As long as the legislature has articulated incapacitation as a penal goal, recidivist sentencing appears to be beyond proportionality review and insulated from an excessiveness challenge.[268]

Because proportionality largely depends on the gravity of the conduct to be punished, when prior criminal behavior is used as an enhancement, it has the potential to distort the proportion between the crime committed and the punishment imposed.[269] Repeated criminal conduct reflects an aggravating factor that may be taken into account in measuring punishment.[270] Generally, retribution principles determine the outer limits of punishment for a crime and aggravating factors like recidivism justify punishment at the upper end of the maximum.[271] If past conduct can be used to impose a penalty in excess of the maximum for the offense, the enhancement must still bear some relationship to the crime committed. Without fixing the enhancement to the crime of conviction, the past misconduct becomes the determinant factor for the punishment and the

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[265] *Id.* at 76 (quoting Harmelin v. Michigan 501 U.S. 957, 998 (1991) (Kennedy, J., concurring)).

[266] *See* Erik G. Luna, Foreward: *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 58–64 (1998) (discussing Supreme Court cases leading to the three-strikes debate).

[267] *See* Andrus, *supra* note 71, at 293 ("[T]he plurality failed to delineate when an increased recidivist sentence . . . constitutes a cruel and unusual punishment.").

[268] For possible ways to determine how much more severely recidivists can be punished, see, for example, Karlan, *supra* note 9, at 896–97 (offering three solutions to the questions of how much more severely recidivists can be punished: (1) defer to the legislature's decision about the appropriate enhancement for recidivists; (2) compare how recidivists are treated in other jurisdictions and reject outliers; and (3) judges make the decision themselves).

[269] *See* Andrus, *supra* note 71, at 294 for combinations of triggering offenses and criminal histories that illustrate the difficulty of determining the proportionality of recidivist sentences. The most troublesome situations—(1) a minor offense and substantial criminal history and (2) a serious offense and a minor criminal history—create the possibility of the past misconduct requiring a sentence out of line with the seriousness of the underlying crime.

[270] *See, e.g.*, Karlan, *supra* note 9, at 896 ("[It is] plausible that there is a widely shared consensus that people who have demonstrated a propensity to commit offenses are more blameworthy than first-time offenders.").

[271] *See* Frase, *Limiting Retribution, supra* note 73, at 90–104; *see also, supra* notes 54–59 and accompanying text.

punishment loses it moorings to the principles of retribution. Past misconduct cannot assume a predominant role in sentencing without subverting the proportion between the crime of conviction and the penalty. To preserve proportionality in the recidivist context, any enhancement based on criminal history should be proportional to the crime of conviction.

In evaluating the excessiveness of a recidivist sentence, the focus therefore must be on the triggering offense with past misconduct playing a relevant but not a determinative role in the proportionality analysis. If the underlying crime is minor and the criminal history is long and serious, or if the crime is serious and the criminal history is minor, the role of the criminal history should be limited. Prior misconduct, in the first scenario, should not result in a harsh sentence out of line with the seriousness of the underlying minor crime. Similarly, the lack of a substantial criminal past should not minimize the punishment for a serious offense. To be true to proportionality principles in these two recidivist scenarios, the triggering offense must be accorded the predominant role.

The Supreme Court's proportionality decisions in the criminal context reveal an unwillingness to find criminal sentences excessive under the Cruel and Unusual Punishment Clause. The decisions show extreme deference to the legislative judgments regarding both the amount of punishment and the punishment goal. The adoption of a standard of gross proportionality, a standard that is almost impossible to meet, reflects the Court's substantial deference to legislative judgments and the importance of legislative limits in the proportionality analysis.

VI. FORFEITURE AND PROPORTIONALITY

The Supreme Court's proportionality analysis in reviewing punitive forfeitures resembles its approach to assessing punitive damages and differs from its approach to reviewing criminal sanctions, primarily due to the absence of legislative limits on the dollar amount subject to forfeiture. In the forfeiture context, the Court does not defer to the legislative determination that any property involved in the offense can be forfeited. Instead, it undertakes its own analysis of the seriousness of the conduct and the proportionality of the forfeited amount to the gravity of the conduct.

Where forfeiture of property is punishment for an offense, it is subject to the proportionality requirement of the Excessive Fines Clause of the Eighth Amendment. The Court in *United States v. Bajakajian* adopted a gross proportionality test for punitive forfeitures—the same test used in determining whether a criminal prison sentence is excessive under the Cruel and Unusual Punishment Clause.[272] Applying this test to the

[272] United States v. Bajakajian, 524 U.S. 321, 336 (1998).

forfeiture of $357,144 for the crime of willful failure to report the transporting of currency in excess of $10,000, the Court found that the offense was not very serious in view of the fact that it is solely a reporting offense,[273] its violation by the defendant did not involve any other illegal activities,[274] and any harm caused was minimal.[275] In addition, the Court noted that the maximum fine for this offense under the Sentencing Guidelines was $5000.[276] Comparing the gravity of the defendant's offense to the forfeiture of $357,144, the Court found the forfeited amount was grossly disproportional to the offense.[277]

The Court limited its proportionality review of forfeitures to those that involve punishment based on *in personam* criminal forfeitures following conviction of a crime.[278] It excluded from the reach of the Excessive Fines Clause both civil *in rem* forfeitures[279] and forfeitures that are remedial and not punitive in nature.[280] It concluded the forfeiture of the currency involved in the failure to report offense constituted punishment because the forfeiture was predicated on the commission of this offense *in personam* and forfeiture was a sanction authorized upon conviction.[281]

The dissent would have accepted the Congressional decision to require the forfeiture of the full amount of currency involved in the reporting violation. According to the dissent, Congress fixed the fine for this offense as a fine plus forfeiture of all the currency.[282] Moreover, the dissent faulted the majority opinion for not granting any deference, much less substantial deference, to the decision of Congress to authorize full forfeiture of the currency.[283] Addressing the gravity of the offense, the dissent viewed it as serious, justifying the forfeiture of all of the cash carried by the defendant.[284]

The crux of the case seems to turn on the question of limits on the dollar value of the property to be forfeited. The dissent viewed the forfeiture statute as imposing a limit on punishment by forfeiture—a person cannot forfeit more than the full amount of the property involved in

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[273] *Id.* at 337.
[274] *Id.* at 337–38.
[275] *Id.* at 339.
[276] *Id.* at 338.
[277] *Id.* at 339 n.14, 340 (acknowledging that the maximum fine in the statute was $250,000, but discounting this maximum and stating that the maximum would apply only to more serious violations of the statute).
[278] *Id.* at 332.
[279] *Id.* at 331.
[280] *Id.* at 329.
[281] *Id.* at 328.
[282] *Id.* at 350 (Kennedy, J., dissenting) (noting that the fine is to be doubled when the reporting offense is committed while violating another law of the United States) (citing 31 U.S.C. § 5322(b) (2000)).
[283] *Id.* at 348.
[284] *Id.* at 348, 351.

the reporting violation.[285] Congress limited the forfeiture punishment to the value of the property and did not authorize forfeiture of anything more. The majority, on the other hand, did not seem to think that Congress imposed any limit on the amount or value of the property subject to forfeiture. Because the amount of the currency involved in a reporting violation can vary widely, from $10,001 to millions of dollars, the majority was unwilling to permit forfeitures of substantial sums without a proportionality assessment of the amount forfeited to the gravity of the offense.

The statutory language requiring forfeiture of "any property . . . involved in such offense,"[286] authorizes punishment without any dollar limit. In essence, Congress did not make a judgment about the limits of the amount that could be forfeited or about the appropriate punishment for violation of this offense. The forfeiture statute, therefore, permits different punishment of offenders who commit the same offense based on the amount of money involved and without regard to any differences in culpability. For example, the person who fails to report $20,000 is punished by forfeiture of $20,000 whereas the person who fails to report $5 million is punished by a forfeiture of $5 million. If there is nothing except the amount of the currency to distinguish the two offenders, the difference in punishment has no relationship to the gravity of the offense.

The majority in *Bajakajian* subjected the punishment of forfeiture to the proportionality principle. The Court adopted the standard of gross disproportionality, rejecting a test of strict proportionality due to the difficulty of determining the gravity of an offense, a determination the Court described as inherently imprecise.[287] Although it borrowed this standard from the Court's proportionality cases in the context of prison sentences, the Court in *Bajakajian* did not adopt the entire test articulated in *Harmelin* and reaffirmed in *Ewing*. In those cases, the plurality opinions used gross disproportionality as a threshold test, and if the prison sentence met that test, then the review should proceed to compare the sentence with the punishment authorized for other crimes in the same jurisdiction and with the punishment for the same crime in other jurisdictions.[288] The majority opinion by Justice Thomas made no mention of a threshold as part of the proportionality test for punitive forfeitures.

The majority opinion, however, as part of its evaluation of the seriousness of the offense, used an intrajurisdictional analysis and looked at other punishments imposed for the same violation in other parts of the

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[285] *Id.* at 348–49.

[286] 18 U.S.C. § 982(a)(1) (2000).

[287] United States v. Bajakajian, 524 U.S. 321, 336 (1998).

[288] Ewing v. California, 538 U.S. 11, 23–24 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring); *Bajakajian*, 524 U.S. at 338.

federal code.[289] Specifically, the Court looked at the prison sentence and fine that could be imposed for violation of the currency reporting offense. It noted that under the sentencing guidelines the maximum fine that could be imposed on Bajakajian was $5000 and the maximum sentence was six months imprisonment.[290] These other penalties for the offense, according to the Court, "confirm a minimal level of culpability."[291] The Court rejected the statutory maximum of five years imprisonment and a $250,000 fine for violation of the currency reporting statute[292] in assessing the gravity of the offense, and instead relied on the lower Sentencing Guidelines penalties of six months and a $5000 fine. The Court stated that the penalties authorized by the sentencing guidelines "undercut any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed."[293]

Comparing the amount forfeited to the maximum fine under the sentencing guidelines, the Court concluded that the forfeiture of $357,144 exceeded the fine of $5000 by "many orders of magnitude."[294] This comparison resembles the ratio analysis used by the Court in the punitive damages proportionality review, although the Court in *Bajakajian* did not state that any ratios between the amount forfeited and the fine would be presumptively disproportionate.

The proportionality review in the forfeiture area also resembles the punitive damages analysis in the Court's willingness to make its own judgment about the gravity of the conduct subject to punishment. Without guidance from Congress as to the dollar limit of the property to be forfeited, the Court was free to use its own judgment as to the seriousness of the offense and the amount proportional to the offense. The absence of limits in the forfeiture statute meant that the Court had to engage in a more active proportionality review and could not rely on a legislative judgment regarding the appropriate amount of punishment for the offense.

VII. THE IMPORTANCE OF LEGISLATIVE LIMITS IN PROPORTIONALITY ANALYSIS

The analysis of the Supreme Court's proportionality decisions in the contexts of punitive damages, criminal sanctions, and forfeitures presented

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[289] *See, e.g.*, Karlan, *supra* note 9, at 901 ("In deciding how culpable Bajakajian was, the Court looked to the harshness of other punishments imposed for the same conduct in other parts of the U.S. Code and contemplated by the sentencing guidelines—a species of intrajurisdictional analysis.").

[290] *Bajakajian*, 524 U.S. at 338.

[291] *Id.* at 339.

[292] 31 U.S.C. § 5322(a) (2000).

[293] *Bajakajian*, 524 U.S. at 339 n.14.

[294] *Id*. at 340.

in this Article demonstrates the importance of legislative limits on punishment in the proportionality analysis. Where the legislature has set caps on punishment, the Court defers to the legislative caps. Where the legislature has not set limits on the amount of punishment, the Court undertakes a more active role in determining the proportionality of the punishment to the gravity of the conduct being punished. This active judicial role in the absence of legislative limits includes a willingness by the Court to make its own judgment about the seriousness of the conduct to be punished, and a willingness to set its own caps on punishment, especially in the area of punitive damages.

Professor Erwin Chemerinsky has analyzed the Supreme Court's jurisprudence regarding punishment in the contexts of the death penalty, criminal imprisonment, and fines and forfeitures and concluded that the Court's approaches to punishment in these different contexts are inconsistent and unjustifiable.[295] Chemerinsky says that the Court itself has not recognized its inconsistent approaches or made any attempt to reconcile its decisions.[296] He argues that the differences in the proportionality analysis for the different punishments cannot be justified by the language in the Constitution, its history, or social policy.[297]

Professor Chemerinsky pays scant attention to the factor that best reconciles the different approaches—the presence or absence of legislative limits on punishment. Although Chemerinsky sees the relevance of legislative choice in the determination of punishment, especially with regard to social policy, he ignores the importance of limits on punishment. He sees a legislature's refusal to impose limits on punitive damages as the equivalent of a legislature's decision to punish the criminal recidivist more severely.[298] However, the absence of limits on punishment does not necessarily reflect a policy choice to permit open-ended punishment. A legislature's non-action on the issue of limits at best reflects no legislative judgment on the issue. The absence of a legislative limit on punishment violates an important principle of just punishment and the rule of law—notice of the consequences for wrongful conduct and a community judgment as to the just deserts for that wrongdoing.[299]

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[295] *See* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1063 (2004) (arguing that justification for the Court's inconsistency in its approach to punishment is unsatisfactory).

[296] *Id*.

[297] *Id*. at 1067.

[298] *Id.* at 1065 ("Is it that there is a pressing social need for deferring to legislative choices for recidivist sentences, but not to a legislature's refusal to impose limits on punitive damages?").

[299] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."); *see also* Zipursky, *supra* note 9, at 171 (stating "fundamental constitutional values and rule-of-law values" demand notice and limits to punishment).

Professor Pamela S. Karlan has also studied the Supreme Court's proportionality decisions in the criminal and civil contexts and addresses what she calls the seeming tension in the Court's approach to constitutional limits on sentences and punitive damages.[300] She concludes that the differences in criminal and civil litigation may explain the Court's retreat from proportionality review in the criminal context and its enthusiastic embrace of proportionality in punitive damages cases.[301] Karlan notes that punitive damages pose different federalism concerns, and that review of punitive damages involves a different level of federal intrusion. Federalism concerns, she suggests, may explain the Court's increasingly robust review of punitive damages.[302] The difference in federal intrusion in criminal and civil cases, she argues, may also incline the Court toward a more active excessiveness review in punitive damages cases.[303] This difference, she argues, means that the Court's proportionality decisions in the civil arena will not spawn collateral litigation in the federal courts and clog the federal courts as proportionality decisions in criminal cases would.[304]

Professor Karlan's most persuasive explanation for the Court's different jurisprudence rests on the different role of juries in the criminal and civil contexts. The power of criminal juries to punish, she points out, is limited in two ways—by the legislatively enacted maximum and by the

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[300] Karlan, *supra* note 9, at 920 (observing that the Court's decisions "with respect to constitutional limits on sentences and damages seem at first in some tension with one another").

[301] *Id*. at 920 ("Differences between the two kinds of litigation may, however, explain why proportionality review is relatively more attractive in punitive damages cases.").

[302] *Id*. ("[P]unitive damages cases may raise reverse federalism concerns that are absent from criminal prosecutions."). The federalism concern arises from the possibility of impermissibly punishing a defendant for conduct committed outside of the state's jurisdiction. In the criminal context, states are limited in their territorial reach, but punitive damages awards pose a risk that a defendant may be punished for extraterritorial conduct. *Id.* at 913 ("[T]here is a significant territorial limitation on the reach of a state's power. This territorial limitation seems to have caused relatively little constitutional litigation in the criminal arena. But the recent punitive damages cases before the Court have involved an extraterritorial dimension."). The Court expressed this concern in *State Farm* and limited the permissible use of out-of-state conduct by the defendant. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").

[303] Karlan, *supra* note 9, at 920 ("[T]he Supreme Court may think the level of federal intrusion can be better controlled in the civil context."). Whereas criminal sentences are subject to federal court intervention through federal habeas corpus or direct appeal to the Supreme Court, federal review of punitive damages is limited to the Supreme Court on appeal from state courts. *Id.* at 910 ("As Justice Ginsburg pointed out, while criminal sentences in state prosecutions can be challenged in federal habeas corpus proceedings as well as on direct appeal, the Supreme Court will be the only federal court policing the area of punitive damages . . . .") (internal quotation omitted).

[304] *Id*. at 911 ("[O]ne of the disadvantages of the Eighth Amendment proportionality principle was the possibility that it could have spawned wholesale collateral litigation, clogging federal court dockets."). Because the Court would need only to police state court awards of punitive damages, and not lower federal courts, the Supreme Court, Karlan suggests, may feel freer to engage in a strict proportionality review of punitive damages. *Id.*

prosecutor's charging decision.[305] The civil jury has neither of these constraints in the absence of statutory caps on punitive damages.[306] As a result, civil juries do not exercise "their discretion within a carefully defined sphere."[307] Although this explanation focuses on the different roles of juries in criminal and civil cases, the real crux is the importance of legislative limits on punishment more than the role of juries.

VIII. LEGISLATIVE LIMITS V. JURY VERDICTS

The absence of any limits on punitive damages means that the punishment is open-ended, unlike criminal punishment with set maxima. Because a jury has no limit on the amount of punitive damages it can award, the Supreme Court has imposed a more active proportionality analysis to determine whether an award is excessive. The development of guideposts and allowable evidence reflects the Court's concern about the need for imposing limits on punitive damages. In the context of criminal imprisonment, the Court has a legislative judgment about the proper proportion of punishment deserved. The Court is unwilling to disagree with the legislative judgment concerning the maximum punishment for a crime and defers to the legislature's authorized punishment unless in a particular case the authorized punishment is way out of line, like the sentence in *Solem,* or like the example of life imprisonment for repeated parking violations.

Several features of a legislative judgment on the proper punishment for criminal conduct explain why courts accord substantial deference to legislative decisions regarding punishment.[308] Judgments about the severity of a crime or the reprehensibility of conduct are often the subject of disagreement.[309] When a legislature draws punishment distinctions based on its moral judgments, or those of the electorate, judges understandably are reluctant to reject those judgments. If judges disagree with the legislative decision regarding severity, they appear to be substituting their own moral judgment and to be doing so without any objective standard.[310] Given the lack of objective criteria in measuring

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[305] *Id*. at 919 (noting that in criminal cases the "jury's ability to punish is constrained by a legislatively enacted statutory maximum," and by the "politically accountable decision about the defendant's potential punishment when the prosecutor makes her charging decision").

[306] *Id*. ("By contrast, in the absence of statutory ratio limits or damages caps, civil juries are not constrained by legislative or executive decisions.").

[307] *Id*. at 920 ("[Civil juries] are not exercising their discretion within a carefully defined sphere.").

[308] According to Professor Zipursky, the legislative framework within which a criminal fine is located normally demands such a high level of deference that courts decline to do a substantive proportionality review under the Excessive Fines Clause. Zipursky, *supra* note 9, at 164.

[309] *See, e.g*., Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1958 (2004) ("People often bitterly disagree about how severe various crimes are.").

[310] *Id*. at 1978.

crime severity, and the fact that notions of reprehensibility involve moral judgments, legislatures are better situated to make these judgments.[311] Deference to legislatures avoids conflicts between the judiciary and the legislature and leaves difficult line-drawing to the legislature.[312]

Although it has been argued that a jury's verdict is entitled to the same deference as given to legislative judgments,[313] the two judgments differ in significant ways. First, the legislative decision as to the proper punishment sets the maximum penalty that can be imposed for a particular crime. In addition, it reflects a policy choice of the community. And third, the maximum penalty applies to all offenders. Since jury awards lack these features, they do not command the same deference given to legislative decisions.[314] The jury award does not reflect a broad community judgment about the wrongfulness of the conduct or of the proper measure of punishment deserved. Juries do not bring the same considerations to their punishment decision that legislators do in their punishment legislation. Juries do not consider the range of other wrongful conduct and how different misconduct deserves different punishment. The jury has only the case before it, and its award does not establish the punishment for similar conduct, or even for the same conduct that is the subject of another lawsuit by a different plaintiff. Two juries deciding the same case but with different plaintiffs can come up with different punitive damages awards. In short, a jury does not speak for the community in a way that applies beyond the parties in the case. More important, the jury has no limits on its discretion in setting the amount of the punitive damages award.

Arguments that the jury system provides the best mechanism for determining fair punishment[315] miss the point that juries are not subject to defined limits. Even if one concedes that juries are better than judges in assessing the degree of reprehensibility and in measuring the appropriate punishment in a particular case,[316] this concession does not address the principle objection that the amount of punishment must be subject to

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[311] *See, e.g.*, Johnson, *supra* note 9, at 504 (arguing that because "proportionality determinations require inherently subjective comparisons of sentence severity with offense seriousness," such comparisons "should be left to legislatures, which are institutionally better positioned to determine the seriousness of a given offense").

[312] *See, e.g.*, Volokh, *supra* note 309, at 1981 ("Deference avoids conflicts with legislators and citizens who firmly and plausibly argue that certain crimes are extremely serious, and who resent seeing those crimes treated as less constitutionally significant than other crimes.").

[313] *See* Chemerinsky, *supra* note 295, at 1069 (noting that in the area of punitive damages, the Court has not shown deference to the jury).

[314] *Id.* (observing that individually driven punitive damages awards do not generally arrive within the protective clothing that a legislative process delivers).

[315] *See, e.g.*, Zwier, *supra* note 6, at 439 (stating that jurors are best able to express the values of their community with regard to the complex value and moral judgments required by the nature of punitive damages).

[316] Professor Zwier argues that juries rather than judges are superior decision makers with regard to punitive damages. *Id.* at 428.

limits. Faith in the jury system does not mean that juries may operate without any standards or constraints. Rule of law demands constraints on participants in the legal system, whether they be judges or juries. To say that punitive damages should be subject to legislative limits does not reject a role for juries in determining punitive damages. The same reasons that make juries especially well-suited to decide issues like reasonableness in tort cases and degrees of culpability in criminal cases make them well-suited to decide whether punitive damages are warranted, and, subject to legislative limits, in what amount.

It is not a distrust of juries that explains the difference in the proportionality review of punitive damages and criminal sentences. It is, rather, the absence of a limit on punitive damages that matters. There is nothing in Supreme Court decisions suggesting that the same punitive damages awards in *BMW* and *State Farm*, had they been awarded by a judge rather than a jury, would have been approved by the Supreme Court. Whether the amount of the award is determined by a judge or jury, the same concern for proportionality of award to wrongful conduct applies. The same guidepost analysis would apply, and the analysis would not require any deference to either judge or jury.

Jury instructions do not substitute for limits on the amount of punitive damages. Although instructions play a valuable role in guiding the jury's determination of the punishment that the misconduct deserves and can focus the jury on the relevant factors that affect the amount of punishment,[317] jury instructions do not limit the amount of a punitive damages award in the absence of a cap.[318] Without a cap, no jury instruction would prevent a jury from giving a huge punitive damages award that a proportionality evaluation would regard as excessive. Even though the jury based its award on its judgment of the reprehensibility of the defendant's conduct, its verdict does not necessarily reflect a societal judgment about the wrongfulness of the conduct.

IX. SETTING LEGISLATIVE LIMITS ON PUNITIVE DAMAGES AWARDS

A legislature can of course set limits on punitive damages as many states have done. These caps, however, do not operate like the statutory maxima on imprisonment found in criminal codes. Generally, existing caps apply to all punitive damages awards without regard to the particular

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[317] *See, e.g.*, Philip Morris USA v. Williams, 127 S.Ct. 1057, 1064 (2007) (requiring state courts to provide juries with guidance on the proper use of evidence of harm to others in determining punitive damages).

[318] The Supreme Court, after reviewing punitive damages pattern jury instructions from Maryland and Alabama, expressed skepticism about jury instructions as insurance against unpredictable outlier awards. Exxon Shipping Co. v. Baker, No. 07-219, slip. op. at 31 (U.S. June 25, 2008).

misconduct justifying punitive damages.[319] A few states have enacted several caps on punitive damages depending on the nature of the wrongful conduct.[320] By contrast, almost all state criminal codes rank different crimes in terms of their reprehensibility and assign different maxima according to the ranking, with the more severe punishments assigned to the most serious crimes.

A state could use the criminal code model and impose different caps for different types of misconduct just as it authorizes different terms of imprisonment for different crimes.[321] A legislature might use a multiplier of compensatory damages to set the upper limit of punitive damages, or it might select a dollar maximum. For example, in contract cases, a state legislature could decide to cap punitive damages at double or triple the amount of the compensatory damages. For fraud cases, the limit could be set at twenty times the value of the property obtained by fraud up to a maximum of $5 million. For injury or death cases, a legislature might decide to limit punitive damages to thirty times the compensatory damages or $20 million, whichever is higher. These limits would reflect society's judgments about the right proportion of punishment to misconduct, and juries would be free to award punitive damages in particular cases up to the limit.[322] Different caps for different types of misconduct should result in less disparity among punitive damages awards by prohibiting the extreme verdict.

Caps on punitive damages need not be so limiting as to prohibit multi-million dollar verdicts. If a state legislature considered certain conduct especially reprehensible and deserving of a large punitive damages awards in the range of $100 million, it could authorize punitive damages up to that amount. Although a jury verdict of $100 million could be challenged on proportionality grounds, the award could be defended as proportional based on the legislative judgment as to the appropriate punishment policy choice and the right proportion of punishment to misconduct as reflected in

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[319] *See, e.g.*, Va. Code Ann. § 8.01-38.1 (2003) (applying its cap of $350,000 to all punitive damage awards); *see also* Rustad, *Iron Cage*, *supra* note 6, at 1346 ("Virginia's cap for total punitive damages is set at $350,000.").

[320] *See, e.g.,* Ala. Code § 6-11-21 (2003) (establishing a general cap of $500,000 and a higher cap of $1,500,000 if the claim involved physical injuries); Fla. Stat. §§ 768.73(1)(a)(1)–(2) (2002) (establishing a general cap of $500,000, a higher cap of $2,000,000 if the defendant's conduct was unreasonably dangerous or produced an unreasonable monetary gain, and no cap if the defendant specifically intended to harm the plaintiff and in fact harmed the plaintiff).

[321] Several commentators have suggested different limits on punitive damage awards based on different factors. *See, e.g.*, Jiang, *supra* note 9, at 813–20 (proposing guidelines similar to the federal sentencing guidelines for federal crimes for the determination of the proper amount of punitive damages to be awarded); Christopher Price, *MPDLS Is Not a Disease: A Proposition for a Model Punitive Damage Limiting Statute In Light of the Constitutional Guideposts From BMW and State Farm*, 17 ST. THOMAS L. REV. 33, 54–56 (2004) (proposing a general cap for most cases and a higher cap when the defendant's conduct results in death or permanent and debilitating physical injury).

[322] Whether juries should be informed about the cap raises an interesting question that is beyond the scope of this Article.

the cap. Just as the Supreme Court upheld a sentence of twenty-five-years-to-life under the California three strikes law by according substantial deference to the legislative judgment that repeat offenders should be incapacitated and sentenced up to life imprisonment,[323] it could defer to a legislative judgment about the proper amount of punitive damages for wrongful conduct and respect jury awards within the statutory cap. Legislative caps that are supported by reasoned penal policy choices addressing particular concerns in a state after debate and legislative hearings would likely be respected by the courts. Such a deliberative process would make the legislative determination of the proper proportion more supportable as a reasonable judgment, a judgment that courts will be less likely or less willing to reject or second-guess.

An example illustrates how a state might justify a high cap on punitive damages awards in particular types of cases. Suppose that a rash of deaths in hospitals and nursing homes in the state leads to legislative hearings on the problem. As a result of these hearings, the legislature learns that many of these deaths occurred as result of calculated decisions on the part of the hospitals and nursing homes to cut costs. The legislature decides that such conduct is extremely serious and reprehensible and it should be both punished and deterred. The legislature decides to deal with the problem by authorizing both criminal and civil penalties. It enacts a criminal provision making such conduct a serious felony subject to ten years of imprisonment and a provision authorizing any victim of such conduct to recover punitive damages up to $100 million. If a punitive damages award in the amount of $100 million in such a case is challenged as excessive, the Supreme Court would be hard pressed to find the award excessive, even if the compensatory damages were minimal. The legislative judgment about the proper amount of punishment, both in criminal imprisonment and in punitive damages, should be accorded substantial deference based on this record. Moreover, this is not an extreme example similar to the one hypothesized by the Supreme Court where a legislature makes "overtime parking a felony punishable by life imprisonment."[324]

The imprimatur of legislative authorization, however, does not insulate a high punitive damages award from judicial scrutiny for excessiveness. Given "the vagueness and contestability of the concept of proportionality,"[325] courts generally should defer to the legislative judgment, yet cases will arise where the courts will need to set the outer limits of punitive damages that a legislature can authorize. An award within the cap should be entitled to a presumption of validity based on

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[323] Ewing v. California, 538 U.S. 11, 25 (2003).

[324] Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (plurality opinion).

[325] *See* Lee, *supra* note 52, at 744; Volokh, *supra* note 309, at 1958 ("People often bitterly disagree about how severe various crimes are.").

judicial deference to the legislative determination of the proper punishment,[326] and only when the authorized punishment is out of line with retributive notions of proportionality should courts step in and limit the punishment.[327]

The judiciary has a role in evaluating the excessiveness of punishment when the legislature has spoken, but it is a limited role.[328] Courts cannot abdicate their responsibility for judging the proportionality of punishment,[329] and they cannot go to the other extreme and second-guess the legislative determination of proper punishment. Perhaps the most that can be expected is for courts generally to defer to the legislature and to "prick the lines"[330] at the margins between proportional and excessive punishment.

Reviewing punitive damages for excessiveness in the absence of legislative limits places the Supreme Court in a difficult position. It must make a determination as to the proportionality of a punitive damages award without any guidance from the legislature as to the appropriate amount of punishment for the conduct at issue. It would be easier for the Court to review the award knowing what the state, through its representatives, authorized as the maximum amount of punishment. What a jury in a particular case determined to be the appropriate damages, or what an appellate court considered to be proportional, does not convey the same societal judgment about the proportionality of punishment to misconduct and does not command the same deference that a legislative judgment does.

X. CONCLUSION

The proportionality analysis adopted by the United States Supreme Court for criminal sanctions differs significantly from its review of jury awards of punitive damages. Whereas the ratio of punitive damages to compensatory damages has become the focus of proportionality review in punitive damage cases, the reprehensibility factor has become the focus of

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[326] *See* Lee, *supra* note 52, at 744 (commenting that due to "the vagueness and contestability of the concept of proportionality," courts should generally defer to legislatures in this realm).

[327] *Id.* at 744–45 (arguing that courts should not defer to the legislature when necessary to protect defendants from a discrete and insular minority).

[328] *Id.* at 744.

[329] *See, e.g.,* Volokh, *supra* note 309, at 1982 ("It is probably wrong to say that courts should never draw constitutional lines distinguishing crimes based on their severity."). Professor Volokh suggests ways for drawing lines based on crime severity and analyzes the problems with a line-drawing model. *Id*. at 1983 ("[C]riticisms of constitutional line-drawing in this area have no considerable force.").

[330] Karlan, *supra* note 9, at 880 ("[Courts] have said, we will not define due process of law. We will leave it to be 'pricked out' by a process of inclusion and exclusion in individual cases."); *id.* at 920 ("[T]he Court may still be merely 'pricking the lines' when it comes to the question of when sentences are excessive or punitive damages are grossly disproportionate . . . .").

proportionality analysis in review of criminal sentences and forfeitures that punish. In evaluating whether a criminal sentence is excessive, the Court defers to the legislative judgments on penal policy, gravity of offenses, and the severity of punishment. Because the legislature has spoken on these issues and has set limits on criminal punishment, the Court is unwilling to say that a particular prison term within the statutory limits is excessive. For punishment without legislative limits, however, the Court is less constrained in evaluating the proportionality of punishment. Reversing a jury verdict of punitive damages for excessiveness does not involve the Court challenging a previously set limit on the amount of punitive damages. Instead, the Court reviews a jury award that was not subject to any limits.

Because the proportionality analysis depends on a judgment concerning the relative seriousness of the defendant's unlawful act, and legislative judgments regarding the proper amount of punishment ascribed to different conduct reflect the community's view of proportional punishment, legislatures should set limits on the amount of punitive damages that juries can award. Legislatures need not and should not leave the proportionality judgment solely to the courts. Legislatures can decide that different misconduct deserves different limits and that particularly reprehensible conduct deserves large punitive damages awards. With legislative limits on punitive damages awards, courts will be forced to consider the reasonableness of the legislative determination of proportional punishment. Courts will generally accept that judgment and, only in rare cases, reject it. Legislative limits on punitive damages not only will make the proportionality analysis more rational, but they will bring the review of punitive damages more in line with the principles of just punishment and due process.